TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 249

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO; BEREA COLLEGE, AND THE AMERICAN MISSIONARY ASSOCIATION, PETITIONERS,

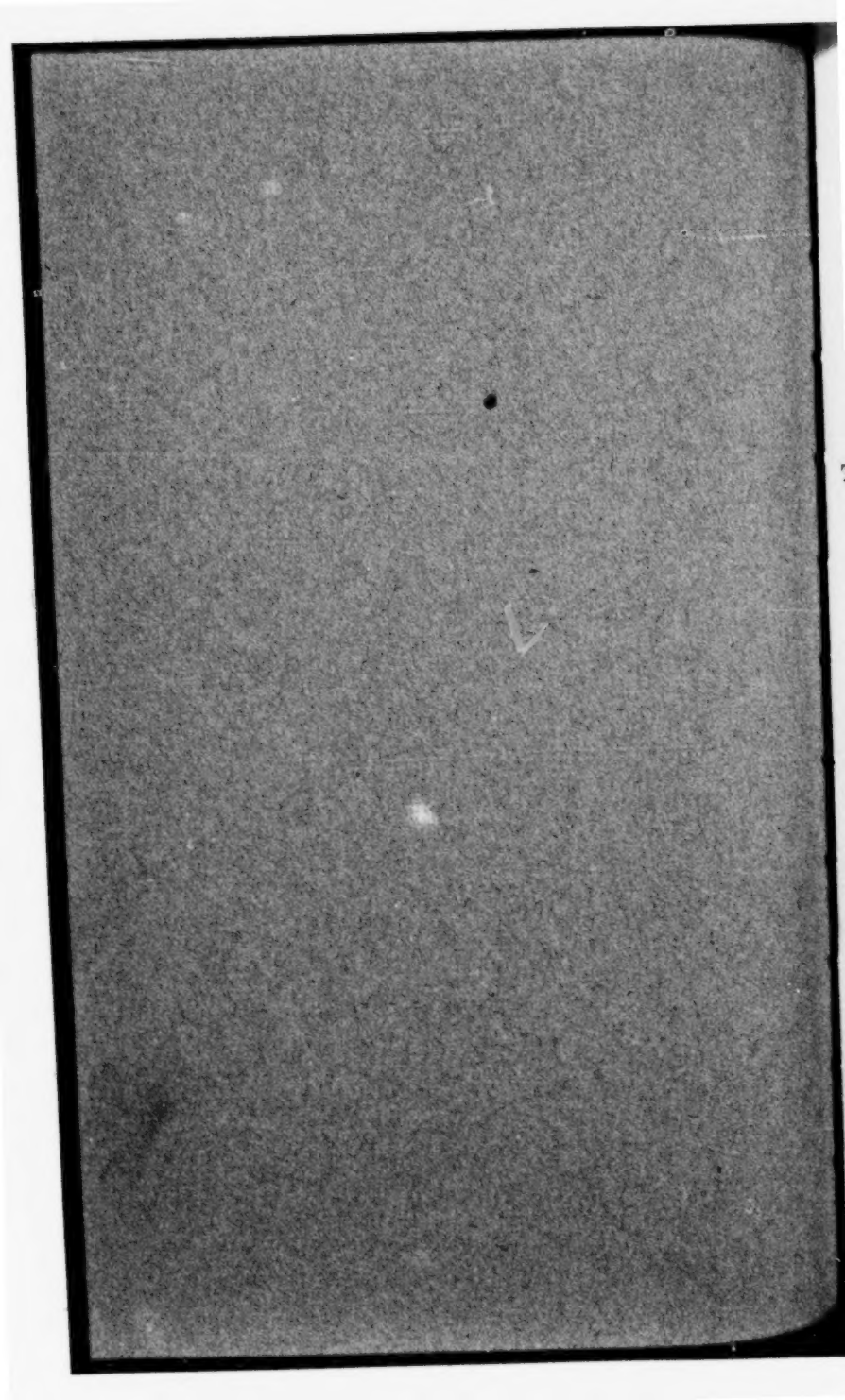
vs.

ORA DAVIS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 20, 1939

(29,466)



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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1923

[fol. a] **SUPREME COURT OF THE STATE OF OHIO, JANUARY TERM, A. D. 1922**

MINUTE ENTRIES

(Minute Book No. 36, Page 469)

Number 17369

Title of Case

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, Berea College, and The American Missionary Association, Plaintiffs in Error,

v.

ORA DAVIS, WILLIAM METCALF, GREENLAWN CEMETERY ASSOCIATION, M. B. Cooper, Annie Helwig, John D. Evans, Sarah Lewis, Mary Wright, Lynn Wright, Ellen Jones, John E. Sater, as Executor and as Trustee under the Will of Mary J. Sessions, Deceased; Helen Metcalf, Juliette Sessions, Elizabeth Sessions, as Administratrix of the Estate of Harriet Sessions, Deceased; The Board of Education of the City School District of Columbus, Ohio; The Columbus Art Association, and The Young Men's Christian Association of Columbus, Ohio, Defendants in Error.

Attorneys: Booth, Keating, Pomerene & Boulger; Webber & Jones; C. A. McCleery, Columbus; Guy W. Mallon, Cincinnati, Ohio, for plaintiffs in error; Vorys, Sater, Seymour & Pease; Leach & McCormick; Morton, Irvine & Blanchard; James M. Butler, Luther L. Boger, Columbus, Ohio, for defendants in error.

Action: Motion for an order directing the Court of Appeals of Franklin County to certify its record.

Error to the Court of Appeals of Franklin County

Transcript of Docket Entries, Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders, and Decrees

1922.

Feb. 2. Motion for an order directing the court of appeals to certify record and acknowledgment of notice and waiver, filed.

" 8. Plaintiff's printed briefs on motion and proof of service filed.

March 2. Printed brief of John E. Sater, Executor, on motion (12) filed.

" 3. Proof of service filed.

March 21. Motion for an order directing the Court of Appeals of Franklin County to certify its record, allowed. Journal No. 29, page 137.
" 21. Order No. 448 issued to Clerk of Court of Appeals to certify record.
April 5. Petition in error and waiver of summons filed.
" " Court of appeals certificate and transcript filed.
" " Original papers filed.
" 6. Papers taken by Spahr & Glenn.
" 26. Printed record and proof of service filed.
June 15. Plaintiff's printed briefs filed. June 16, 1922, proof of service filed.
July 14. Printed briefs of John E. Sater, Execu*trix*, filed. July 17, 1922, proof of service filed.

[fol. b]

Aug. 9. Plaintiff's printed reply briefs filed. Aug. 9, 1922, proof of service filed.
Oct. 25. Papers returned by Spahr & Glenn.
Dec. 29. Judgment affirmed. Journal No. 29, page 329.
1923.
Jan. 8. Mandate issued.
Feb. 2. Original papers sent to Clerk.
March 5. Certificate of Chief Justice as to federal question filed.
" " Certified copy of opinion filed.

[fol. c] IN THE SUPREME COURT OF OHIO

TRANSCRIPT OF JOURNAL ENTRIES

1922.
March 21. Motion for an order directing the Court of Appeals of Franklin County to certify its record:

"It is ordered by the court that this motion be, and the same hereby is, allowed." Journal No. 29, page 139.

Dec. 29. "This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendants in error recover from the plaintiffs in error their costs herein expended, taxed at $—.

"Ordered, that a special mandate be sent to the Court of Appeals of Franklin County to certify its record." Journal No. 29, page 329.

[fol. d] STATE OF OHIO
City of Columbus:

SUPREME COURT OF THE STATE OF OHIO, January Term, A. D. 1923

CLERK'S CERTIFICATE

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct transcript of the docket and journal entries in the foregoing named case, wherein The Young Men's Christian Association of Columbus, Ohio, et al., are plaintiffs in error, and Ora Davis et al., are defendant in error, taken and copied from Minute Book and Journal of the Records of said Court.

I further certify that the printed copy of the record hereto attached is a true and correct copy of the record in said cause filed in said Supreme Court of Ohio.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 6th day of March, A. D. 1923.

Seba H. Miller, Clerk Supreme Court. [Seal of the Supreme Court of the State of Ohio.]

[fol. e] IN THE SUPREME COURT OF OHIO

[Title omitted]

CERTIFICATE OF THE CHIEF JUSTICE OF THE SUPREME COURT OF OHIO

In the foregoing cause I hereby certify that the plaintiffs in error claimed the right and privilege of freedom from contribution to and immunity from the incidence of the federal estate tax (40 U. S. Statutes 1096 et seq.). Said federal tax was paid by John E. Sater as executor, and plaintiffs in error, as corporations organized and operated exclusively for religious, charitable and educational purposes, claimed that under paragraph 3 of section 403 of the federal estate tax law of 1918 (40 U. S. Statutes 1098) no part of said tax could be collected from them, as the statute last cited conferred upon them immunity from contribution to or the payment of said tax. The petition in error of plaintiffs in error was dismissed by a decision against the said title, right, privilege and immunity, which was specially set up and claimed by plaintiffs in error.

This certificate is made as explanatory of the record.

Dated this 5th day of March, 1923.

Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. f] IN THE SUPREME COURT OF OHIO

[Title omitted]

OPINION, WANAMAKER, J.

1. The tax or excise provided for by the Federal Act of 1918, entitled an "Estate Tax," is a legal charge made upon the decedent's estate and his right to transmit it either by will or by law as an intestate.

2. The charges imposed by law upon an estate must first be paid out of the estate as a whole, before payment of the charges imposed upon the estate by the will of the testator.

3. A residuary devisee or legatee is presumed in law to be in the position of the last lienholder, after all prior lawful claims and charges have been satisfied out of the estate.

(No. 17369. Decided December 29, 1922)

Error to the Court of Appeals of Franklin County

Mary J. Sessions died April 1, 1919, leaving a last will and testament, whereby she undertook to dispose of a large estate. By her will she made numerous specific bequests and devises to relatives and friends, and then by residuary clause gave "all the rest, residue, and remainder," of her estate to certain charitable, religious, and educational institutions, including the plaintiffs in error.

Hon. John E. Sater was named executor and trustee under the will. He filed his petition in the court of common pleas for construction of the will, and for the advice and direction of the court as to the federal estate tax and the distribution of the assets of the estate, and various other matters pertaining to his duties as such [fol. g] executor and trustee.

All parties being before the court, the cause was heard, argued, and submitted, whereupon the court found "that the federal estate tax is a debt against the estate of said decedent which must be paid by the executor out of the general assets of the estate before making any distribution among the residuary legatees * * *; that the legatees and devisees in the will are entitled to receive their respective bequests and devises in full, and free from the payment of said estate tax, unless necessary to pay debts," etc.

The residuary legatees appealed the cause to the court of appeals, which found and entered the same judgment as the court of common pleas.

Error is now prosecuted to this court to reverse the judgments below.

Messrs. Webber & Jones; Mr. C. A. McCleary; Mr. Guy Mallon and Messrs. Booth, Keating, Pomerene & Boulger, for plaintiffs in error.

Messrs. Vorys, Sater, Seymour & Pease; Mr. James M. Butler; Mr. L. M. Boger; Mr. Chas. A. Leach; Messrs. Arnold, Game & Wright and Messrs. Morton, Irvine & Blanchard, for defendants in error.

WANAMAKER, J.:

The single question in this case is whether the executor, who has paid the federal tax from the general assets of the estate in his hands, shall collect the amount of that tax from the specific devisees and legatees in the respective portions of their several devises and bequests, or shall deduct it, together with other charges, debts and costs [fol. h] of administration, from the total assets, in finding the "rest, residue and remainder" of the estate bequeathed to the residuary legatees.

The charges made against an estate may be generally divided into two classes.

First. Those that the decedent charges through his will in favor of devisees and legatees.

Second. Those that the law charges in favor of the public or the various political subdivisions thereof.

It is elementary of course that the latter class is prior and paramount in character, and it becomes important, therefore, to first ascertain the nature of the charge in question.

The federal statute involved denominates the federal legal charge as an "estate tax," and that charge obviously becomes fixed immediately upon the death of a person having an estate subject to such tax. All the provisions of the act are consistent with his denomination.

The language of the act, Section 401 (40 Stats. at Large, 1096), clearly shows that the tax "is hereby imposed upon the transfer of the net estate," after all legal charges have been deducted, that is, charges imposed by law, together with such additional charges as provisions of the statute itself include in the ascertainment of the net estate.

In short, it was the plain purpose to enact a revenue raiser, which should impose a charge or excise upon the decedent's right to direct or control the transfer of his estate, either under his will, or under [fol. i] the law.

It was therefore not an inheritance tax. It had no relation whatsoever, so far as herein involved, to any charge upon any devise or legacy, or the right of any person, natural or artificial, to take, hold or receive any portion of an estate.

In this view of the case, the estate must be considered as a whole, without regard to the nature, character, or amount of the legacies or bequests.

In the distribution of property agreeably to the will it is elementary of course that the testator may, in a large measure, determine the priority in which his several bounties may be distributed, and in so doing it is to be presumed that a legacy specific as to the

person, thing, or amount, shall have priority over a mere general provision; especially, from its very nature, over all residuary devises and legacies.

It would be a strange legal paradox, indeed, to hold residuary devises, legacies or bounties prior to those that are express and specific. The plaintiffs in error are designated for the first time in Item 10, after all specific devises and legacies have been provided for, in the following language: "All the rest, residue, and remainder of my estate and property, real, personal and mixed, of every nature and description, or wheresoever situate, * * * I give, devise and bequeath to The Young Men's Christian Association," etc. This fact affords a clear and conclusive presumption that all charges imposed by the law or by the testator should be paid out of the estate before [fol. j] any right should ripen in behalf of the residuary devisees or legatees under this item.

This view supports the undoubted intention of the testator in the making of the will in all its various provisions, as well as the plain provisions of the federal statute. It is unnecessary to refer to this statute further than to quote a few lines from Section 408 (40 Stats. at Large, 1100):

"It being the purpose and intent of this title that so fas as is practicable, and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

The above view of the case is supported by a number of decisions, among which are In re Hamlin, 226 N. Y., 407; Plunkett v. Old Colony Trust Co., 233 Mass., 471; United States v. Perkins, 163 U. S., 625, and People v. Bemis et al., Exrs., 68 Colo., 48.

The decision generally urged to hold the contrary doctrine relates basically to an inheritance tax, the right to receive rather than the right to transmit.

Judgment of the court below is affirmed.

Judgment affirmed.

Marshall, C. J., Hough, Robinson, Jones, Matthias and Clark, JJ., concur.

[fol. k] STATE OF OHIO,
City of Columbus:

SUPREME COURT OF THE STATE OF OHIO, OF THE TERM OF JANUARY, A. D. 1922

REPORTER'S CERTIFICATE

I, J. L. W. Henney, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing transcript, consisting of — (—) pages, constitutes a full, true and correct copy of the original opinion of the Supreme Court of Ohio in the case of The Young Men's Christian Association et al. v. Ora Davis et al., as the same appears on file and of record in this office, as of the date of this certificate.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court this second day of March, A. D., 1923.

J. L. W. Henney, Reporter. (Seal of the Supreme Court of the State of Ohio.)

[fol. 1] SUPREME COURT OF OHIO

No. 17369

[Title omitted]

PETITION IN ERROR—Filed April 5, 1922

Plaintiffs in error say that at the January term of the Court of Appeals of Franklin County, Ohio, to-wit, on the 18th day of Janu-
[fol. 2] ary, 1922, all of the defendants in error, save and except The Young Women's Christian Association of Columbus, Ohio, recovered a judgment and decree, by consideration of said Court of Appeals, against plaintiffs in error in an action pending therein, wherein John E. Sater, as Executor of the last will and testament of Mary J. Sessions, deceased, was plaintiff, and plaintiffs in error and all of the defendants in error, save and except said John E. Sater as Executor of said last will and testament, were defendants; said action having been brought by said John E. Sater as said Executor for the purpose of obtaining the judgment of the court determining the manner in which the payment of taxes, and especially the federal estate transfer tax, and costs and expenses incurred by him in the administration of his duties as said Executor, should be apportioned among the legatees and devisees named in said last will and testament of said Mary J. Sessions, deceased. A transcript of the docket and journal entries and the original papers in said cause are filed herewith.

There is error in said record and proceedings in this, to-wit:

(1) Said court erred in overruling the separate motions of each of plaintiffs in error for a new trial.

(2) Said court erred in rendering judgment against plaintiffs in error and in favor of the specific legatees and devisees under said last will and testament, said specific legatees and devisees being defendants in error herein.

(3) Said court erred in finding, decreeing and adjudging that the said federal estate transfer tax was a debt of the estate of said
[fol. 3] Mary J. Sessions, deceased, and as such must be paid by said executor out of the general assets of the estate before making distribution to plaintiffs in error and subsequent to making distribution to the specific devisees and legatees, defendants in error.

(4) Said court erred in finding, adjudging and decreeing that defendants in error who received specific legacies and devises under said last will and testament of Mary J. Sessions, deceased, were entitled to receive their respective legacies and devises in full, free from the payment of said federal estate transfer tax or any part thereof.

(5) Said court erred in decreeing and adjudging that said John E. Sater, as Executor aforesaid, should not charge to or collect from any of the legatees or devisees, under the will of said Mary J. Sessions, deceased, other than plaintiffs in error and The Young Women's Christian Association of Columbus, Ohio, any amounts paid by him on account of said federal estate transfer tax.

(6) Said court erred in decreeing and adjudging that the costs and expenses of administration of said estate were not chargeable against the specific legatees and devisees, and that only the residuum of said estate of Mary J. Sessions, deceased, after the payment of all said costs and expenses, was payable to plaintiffs in error.

(7) Said court erred in not finding and decreeing that plaintiffs in error and The Young Women's Christian Association of Columbus, Ohio, were exempt from paying or contributing to the payment of the federal estate transfer tax.

Wherefore, plaintiffs in error pray that said judgment of the Court of Appeals may be reversed, that they may be restored to all things [fol. 4] they have lost by reason thereof, and that this court render the judgment that should have been rendered by the court below.

The Young Men's Christian Association of Columbus, Ohio, By Webber and Jones, and C. A. McCleary, Its Attorneys. Berea College, By Guy O. Mallon and Booth, Keating, Pomerene and Boulger, Its Attorneys. The American Missionary Association, By Booth, Keating, Pomerene and Boulger, Its Attorneys.

IN SUPREME COURT OF OHIO

WAIVER OF SUMMONS, ETC.

Defendants in error waive the issuance and service of summons and voluntarily enter their appearance herein.

Vorys, Sater, Seymour and Pease, Attorneys for John E. Sater, Trustee and Executor, M. B. Cooper, Sarah Lewis, Juliette Sessions, et al.; James M. Butler and L. L. Boger, for Mrs. Metcalf. The Board of Education of the City School District of Columbus, Ohio, By Chas. A. Leach, Attorney. The Columbus Art Association, By Arnold, Game and Wright. Young Women's Christian Association of Columbus, By Morton, Irvine and Blanchard.

[fol. 5] **Record in Court of Appeals**

CLERK'S CERTIFICATE

STATE OF OHIO,
Franklin County, ss:

In obedience to the commands of Order No. 448 issued by the Supreme Court of Ohio pursuant to an application made by The Y. M. C. A. et al., asking that the Court of Appeals of Franklin County be directed to certify its Record in the above entitled cause to the said Supreme Court of Ohio, I do hereby certify that attached hereto are duly certified transcripts of the docket and journal entries of the Court of Common Pleas and of the Court of Appeals in said cause; and all of the original papers, including the pleadings and bill of exceptions, filed in the Court of Common Pleas in said cause, and all of the original papers filed in the Court of Appeals in said cause, the same being numbered from one to —; and a duly certified copy of the opinion of the Court of Appeals in said cause; all of which are herewith transmitted to the said Supreme Court of Ohio.

In testimony Whereof, I have hereunto subscribed my name as Clerk of the Court of Appeals, and have attached hereto the Seal of said Court at Columbus, Ohio, this 29th day of March, A. D. 1922.

Harold C. Gockenbach, Clerk of the Court of Appeals in and for Franklin County, Ohio, By Herman Maass, Deputy. [Seal.]

[fol. 6] IN COURT OF APPEALS OF FRANKLIN COUNTY

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

1921, July 29.—Appeal Bond filed.
1921, July 29.—Transcript of Docket and Journal Entries filed. Twenty-three (23) Original Papers filed as follows, to-wit: Petition, 10 Entries of Appearance, 4 Motions, Reply, 3 Entries, Copy of Entry, 2 Briefs.
1921, September 10.—Motion to advance filed.
1921, October 1.—Three Briefs of Plaintiff filed.
1922, January 18.—Motion of Y. M. C. A. for new trial filed.
1922, January 18.—Motion of Y. W. C. A. for new trial filed.
1922, January 18.—Motion of Berea College for a new trial filed.
1922, January 18.—Motion of American Missionary Association for a new trial filed.
1922, January 18.—Finding and Decree as per Entry.

In Court of Appeals of Franklin County

Motions for New Trial

Defendant, The American Missionary Association, moves that the Court vacate, set aside and hold for naught the judgment heretofore rendered in this cause and grant said defendant a new trial for the following reasons, to-wit:

1. The Court erred in finding that the Federal Estate Tax was a debt against the estate of said decedent which must be paid by the executor out of the general assets of the estate before making distribution to this defendant.

[fol. 7] 2. The Court erred in finding that the specific legatees and devisees are each entitled to receive their respective bequests and devises free from the payment of said Federal Estate Tax.

3. The Court erred in finding that the executor shall not charge to or collect from any of the legatees or devisees under the will of Mary J. Sessions, deceased, other than the residuary legatees, the Young Men's Christian Association, the Young Women's Christian Association, Berea College and the American Missionary Association, the amounts paid by him for said Federal Estate Tax.

4. The Court erred in holding that the costs of this *section* should not be paid by the specific legatees and devisees named in said will.

5. The construction placed upon the federal estate tax by the Court in its judgment is contrary to law.

6. The Court erred in not exempting this defendant from contribution to, the payment of, or the assessment against it by the executor, of any part of said Federal Estate Tax.

7. The judgment of the Court is contrary to law.

Booth, Keating, Pomerene & Boulger, Attorneys for said Defendant.

Defendant, The Young Women's Christian Association of Columbus, Ohio, moves that the Court vacate, set aside and hold for naught the judgment heretofore rendered in this cause and grant said defendant a new trial for the following reasons, to-wit:

1. The Court erred in finding that the Federal Estate Tax was a debt against the estate of said decedent which must be paid by the executor out of the general assets of the estate before making distribution to this defendant.

[fol. 8] 2. The Court erred in finding that the specific legatees and devisees are each entitled to receive their respective bequests and devises free from the payment of said Federal Estate Tax.

3. The Court erred in finding that the executor shall not charge to or collect from any of the legatees or devisees under the will of

Mary J. Sessions, deceased, other than the residuary legatees, the Young Men's Christian Association, the Young Women's Christian Association, Berea College and the American Missionary Association, the amounts paid by him for said Federal Estate Tax.

4. The Court erred in holding that the costs of this action should not be paid by the specific legatees and devisees named in said will.

5. The construction placed upon the federal estate tax by the Court in its judgment is contrary to law.

6. The Court erred in not exempting this defendant from contribution to, the payment of, or the assessment against it by the executor, of any part of said Federal Estate Tax.

7. The judgment of the Court is contrary to law.

Morton, Irvine & Blanchard, Attorneys for said Defendant.

Defendant, Berea College, moves that the Court vacate, set aside and hold for naught the judgment heretofore rendered in this cause and grant said defendant a new trial for the following reasons, to-wit:

1. The Court erred in finding that the Federal Estate Tax was a debt against the estate of said decedent which must be paid by the executor out of the general assets of the estate before making distribution to this defendant.

[fol. 9] 2. The Court erred in finding that the specific legatees and devisees are each entitled to receive their respective bequests and devises free from the payment of said Federal Estate Tax.

3. The Court erred in finding that the executor shall not charge to or collect from any of the legatees or devisees under the will of Mary J. Sessions, deceased, other than the residuary legatees, the Young Men's Christian Association, the Young Women's Christian Association, Berea College and the American Missionary Association, the amounts paid by him for said Federal Estate Tax.

4. The Court erred in holding that the costs of this action should not be paid by the specific legatees and devisees named in said will.

5. The construction placed upon the federal estate tax by the Court in its judgment is contrary to law.

6. The Court erred in not exempting this defendant from contribution to, the payment of, or the assessment against it by the executor, of any part of said Federal Estate Tax.

7. The judgment of the Court is contrary to law.

Guy Mallon and Booth, Keating, Pomerene & Boulger, Attorneys for said Defendant.

Defendant, The Young Women's Christian Association of Columbus, Ohio, moves that the Court vacate, set aside and hold for naught

the judgment heretofore rendered in this cause and grant said defendant a new trial for the following reasons, to-wit:

1. The Court erred in finding that the Federal Estate Tax was a debt against the estate of said decedent which must be paid by the [fol. 10] executor out of the general assets of the estate before making distribution to this defendant.

2. The Court erred in finding that the specific legatees and devisees are each entitled to receive their respective bequests and devises free from the payment of said Federal Estate Tax.

3. The Court erred in finding that the executor shall not charge to or collect from any of the legatees or devisees under the will of Mary J. Sessions, deceased, other than the residuary legatees, the Young Men's Christian Association, the Young Women's Christian Association, Berea College and the American Missionary Association, the amounts paid by him for said Federal Estate Tax.

4. The Court erred in holding that the costs of this action should not be paid by the specific legatees and devisees named in said will.

5. The construction placed upon the federal estate tax by the Court in its judgment is contrary to law.

6. The Court erred in not exempting this defendant from contribution to, the payment of, or the assessment against it by the executor, of any part of said Federal Estate Tax.

7. The judgment of the Court is contrary to law.

Webber & Jones, and C. A. McCleary, Attorneys for said Defendant.

IN COURT OF APPEALS OF FRANKLIN COUNTY

ENTRY OF FINDINGS AND JUDGMENT

This day this cause came on to be heard upon the petition and the copy of the will attached thereto, which was agreed to be a full and true copy of such will, and all of the defendants having voluntarily entered their appearance in said cause, the same was argued by coun- [fol. 11] sel and submitted to the court, and the court being fully advised, finds that the federal estate tax a debt against the estate of said decedent which must be paid by the Executor out of the general assets of the estate before making any distribution among the residuary legatees, namely, American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, and the Young Women's Christian Association of Columbus, Ohio; that the legatees and devisees in the will who received specific legacies and devises under the will, are entitled to receive their respective bequests and devises in full, and free from the payment of said estate tax, unless necessary to pay debts, and that the Executor shall not

charge to or collect from any of the legatees or devisees under the will, other than said residuary legatees, any amounts paid by him for said federal estate tax.

The Court further finds that the costs and expenses of administration are payable out of the general funds in the hands of the executor and are not chargeable against devisees and legatees of specific devises or bequests, and the residuum only, after payments of all such costs and expenses, is payable to the residuary legatees; but for expenses of repairs, improvements, insurance, taxes and assessments incurred since the death of the testatrix upon the real estate specifically devised, and the charges for services in collecting the rents and making leases and keeping the property in repair, and other similar services respecting said real estate, are not charges against the general assets in the hands of the Executor, but the Executor should charge to and collect from the respective devisees of specific real estate the expenses so incurred by him and the charges for his services [fol. 12] on behalf of the respective devisees, each devisee to pay to the Executor the amount of expense incurred and the charge for services made by the Executor with respect to such devisee's property.

Said petition is dismissed as to the request marked "D," relating to the collateral inheritance tax law of Ohio, on the ground that this court in this proceeding has no jurisdiction of such question.

To which findings and judgment of the court said defendants, The American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, and the Young Women's Christian Association of Columbus, Ohio, and each of them jointly and severally except.

And thereupon the defendants, The American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, and The Young Women's Christian Association of Columbus, Ohio, each filed its separate motion for a new trial and the same was submitted to the Court, and the Court overruled each of said motions, to which each of said parties at the time excepted.

It is ordered and adjudged by the court that said executor pay the costs of this action out of the general assets of said estate; to which the American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, and The Young Women's Christian Association of Columbus, Ohio, each severally and separately excepted.

[Duly certified.]

[fol. 13]

Record Court Common Pleas

Transcript of Docket and Journal Entries

1921, March 28.—Petition and Affidavit filed. Copy, $2.00.

1921, April 9.—Waiver of Mary Wright, L. W. Wright, Helen W. Jones and Sarah Lewis filed and appearance entered herein.

1921, April 13.—Waiver of the American Missionary Association filed and appearance entered.

1921, April 13.—Waiver of Berea College filed and appearance entered by Mallon and Vonderburg, Attorneys.
1921, April 14.—Waiver of Green Lawn Cemetery Association filed and appearance entered herein.
1921, April 14.—Waiver of John E. Sater, Trustee, filed and appearance entered herein.
1921, April 14.—Waiver of Helen Metcalf filed and appearance entered herein.
1921, April 14.—Waiver of William Metcalf filed and appearance entered herein.
1921, April 14.—Waiver of Board of Education filed and appearance entered herein by C. A. Leach, Attorney.
1921, April 14.—Waiver of Columbus Art Association filed and appearance entered herein by Arnold and Game, Attorneys.
1921, April 14.—Motion to advance filed.
1921, April 16.—Cause advanced for trial as entry.
[fol. 14] 1921, April 19.—Waiver of Y. M. C. A. and Y. W. C. A. filed and appearance entered.
1921, April 23.—Waiver of Ora Davis filed and appearance entered herein.
1921, April 28.—R. R. Walcutt appointed stenog. as Entry.
1921, May 6.—Reply brief filed.
1921, July 20.—Motion of Y. M. C. A. and Y. W. C. A. filed for a new trial.
1921, July 20.—Motion of Berea College filed for a new trial.
1921, July 20.—Motion of American Missionary Association filed for a new trial.
1921, July 20.—Motion for a new trial overruled. Ex. Notice of appeal and appeal bond fixed at $500.00 and Executor's costs as entry.

IN THE COURT OF COMMON PLEAS

PETITION

1. Plaintiff is the duly appointed, qualified and acting executor of the last will and testament of Mary J. Sessions, deceased, a copy of which said will is hereto attached, marked Exhibit A, and made a part hereof. The defendants, Ora Davis, William Metcalf, Green Lawn Cemetery Association, M. B. Cooper, Annie Helwig, John D. Evans, The Board of Education of the Columbus, Ohio, School District, and The Columbus Art Association, are each named as legatees of specific legacies in said will. The defendants, M. B. Cooper, Annie Helwig, John D. Evans, Sarah Lewis, Mary Wright, Lynn Wright, Ellen Jones, Helen Metcalf, Juliette Sessions, Elizabeth Sessions and [fol. 15] Harriet Sessions, the latter of whom is now deceased and is represented herein by Elizabeth Sessions as Administratrix of her estate, are named in said will as devisees of specific devises. John E. Sater, Trustee, is named in said will as a trustee thereunder, of specific real estate. The Young Men's Christian Association of Columbus,

Ohio, The Young Women's Christian Association of Columbus, Ohio, Berea College and The American Missionary Association, are each residuary legatees named in said will, and are each entitled to a one-fourth share of the residuary estate of said testatrix. The defendants, The Young Men's Christian Association of Columbus, Ohio, and The Young Women's Christian Association of Columbus, Ohio, are each charitable, educational and religious corporations, incorporated and organized under the laws of the state of Ohio not for profit, are each residents and citizens of the state of Ohio, and are organized and operated exclusively for religious, charitable and educational purposes. Defendant, Berea College, is a corporation, incorporated and organized under the laws of the state of Kentucky for religious, educational and charitable purposes and not for profit, and is a resident and citizen of the state of Kentucky, and is organized and operated exclusively for religious, charitable and educational purposes. Defendant, The American Missionary Association, is a corporation, incorporated and organized under the laws of the state of New York for religious, educational and charitable purposes and not for profit, and is a resident and citizen of the state of New York, and is organized and operated exclusively for religious, charitable and educational purposes.

[fol. 16] 2. Plaintiff has paid on account of the Federal Estate Tax, to the Collector of Internal Revenue of the United States in and for the Eleventh District of Ohio, the sum of more than Thirty-one Thousand Dollars ($31,000.00), under the United States Revenue Act of 1918, Title 4, known as the Estate Tax.

3. Plaintiff is in doubt as to the proper distribution of the assets of said estate among the devisees of specific devises, legatees of specific legacies and the residuary legatees, and therefore requests the direction and judgment of this court in respect to said estate, and the property thereof to be administered, and of the rights of the several defendants in interest, in the following respects, to-wit:

(a) Is the Federal Estate tax payable out of the "net estate" as defined in the Federal Estate Tax Law, and shall the amounts paid on account of said Federal Estate Tax be charged against the real estate specifically devised, the specific legacies mentioned in said will, or out of the general assets of the estate before making any distribution among the residuary legatees, to wit, The American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, and The Young Women's Christian Association of Columbus, Ohio?

(b) Shall the costs and expenses of administration be made a charge in part against said devisees and legatees of specific devises and legacies, or shall such expenses and costs be paid out of the general assets of the estate before making distribution to such residuary legatees?

(c) Shall the expenses of repairs, improvements, insurance, [illegible]es and assessments, incurred since the death of testatrix, upon the real

[fol. 17] estate specifically devised, and the payment for services in collecting the rents, and making leases, and keeping said property in repair, and other similar services, be charged to the specific property on account of which such expenses were incurred, or otherwise?

(d) Are any of the four religious, charitable and educational organizations named as residuary legatees in said will, required to pay any amount under the collateral inheritance tax law of Ohio in force at the death of testatrix, towit, April 1st, 1919, and may the amount of the Federal Estate Tax be deducted from the estate before said inheritance tax attaches to devises and bequests.

Wherefore, plaintiff prays for the direction and judgment of the Court in the premises.

Vorys, Sater, Seymour and Pease, Attorneys for the Plaintiff.

STATE OF OHIO,
Franklin County, ss:

John E. Sater, being first duly sworn, says that he is the Executor of the Last Will and Testament of Mary J. Sessions, deceased, plaintiff in the above entitled action, and that the facts stated and allegations therein contained are true, as he verily believes.

John E. Sater.

Sworn to before me and subscribed in my presence, this 28th day of March, 1921. Lowrey F. Sater, Notary Public, Franklin County, Ohio. (Seal.)

[fol. 18] EXHIBIT A TO PETITION

Last Will and Testament

I, Mary J. Sessions, of the City of Columbus, Franklin County, Ohio, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking and making null and void all other last wills and testaments by me heretofore made.

Item I. It is my will that all of my just debts and funeral expenses shall be paid by my executor hereinafter named as soon after my death as may be convenient for him to do so.

Item II. I give and bequeath to Ora Davis the sum of five thousand dollars ($5,000.00).

Item III. I give and bequeath to William Metcalf, of Washington, D. C., the sum of five thousand dollars ($5,000.00).

Item IV. I give and bequeath unto the Greenlawn Cemetery Association, of Columbus, Ohio, the sum of five hundred dollars

($500.00), to be invested by the trustees of said association, and the income derived therefrom to be expended in the care of the lot in Greenlawn Cemetery in which I shall be buried, according to the requirements adopted by the trustees of said association for the perpetual care of said lot in said Cemetery.

Item V. I give, devise and bequeath to each of my friends and faithful servants, M. B. Cooper, Annie Helwig and John G. Evans, the sum of five thousand dollars ($5,000.00), in recognition of the [fol. 19] devoted manner in which they have served my interests and of the many kindnesses that I have received at their hands.

In addition thereto, I give, devise and bequeath to M. B. Cooper the property known as Numbers Thirty-one and Thirty-three (31 and 33) North Champion Avenue, in the City of Columbus, Ohio, beginning at a point in the west line of Champion Avenue two hundred twenty-six and thirteen hundredths (226.13) feet northerly from an iron pin at the intersection of the north line of Broad Street and the west line of Champion Avenue; thence northerly along the west line of Champion Avenue thirty-seven and eighty-two hundredths (37.82) feet to the corner of a parcel of land deeded to R. Clark Wright by Theodore Rhodes and wife February 24th, 1904; thence westerly along the south line of said Wright tract one hundred eighty-three and seven hundredths (183.07) feet to a point in the east line of a twenty (20) foot alley; thence southerly along the east line of said alley thirty-seven and eighty-two hundredths (37.82) feet to a point; thence easterly at right angles, to the place of beginning.

I give, devise and bequeath to Annie Helwig the properties known as Lots twenty-two (22) and twenty-three (23) of John M. Pugh's Subdivision of Lots one (1), two (2), three (3), four (4) and five (5) of S. Brush's Addition to the City of Columbus, Ohio, as the same are numbered and delineated upon the recorded plat thereof, of record in Plat Book 3, page 254, Recorder's Office, Franklin County, Ohio, which premises are situated on Latta Avenue, between Fair and Madison Avenues in said city.

[fol. 20] I give, devise and bequeath to John D. Evans the property known as Number four hundred and fifty-seven (No. 457) East Gay Street, in the City of Columbus, Ohio, which said premises are a part of John Morrison's Subdivision of lots north of Broad Street and west of Washington Avenue, and being a tract of land fronting thirty-two (32) feet on Gay Street and eighty (80) feet on Ninth Street.

Item VI. I give, devise and bequeath to Sarah Lewis (formerly Sarah Wright), Mary Wright Woodnut (now Mary Wright), Linn Wright (grandson of Horace Wright) and Ellen Jones (daughter of Horace Wright), share and share alike, the premises situated at the southeast corner of Long and High Streets, in the City of Columbus, Ohio, known as the "Sessions Block," and being Inlot three hundred and twenty-two (322) in said city, as the same is numbered and delineated upon the recorded plat thereof.

In the event I should survive any of said beneficiaries named in this item of my will, who, at the time of his or her death should leave no lawful issue surviving me, it is my will and I hereby direct, that the property so devised to any such beneficiary or beneficiaries, shall pass to and vest absolutely, share and sahre alike in such of said beneficiaries as shall survive me.

Item VII. I give, devise and bequeath the property known as the "Johnson Building," situated on the west side of High Street, in Columbus, Ohio, and being Inlot number two hundred and sixty-two (No. 262) in said city, as the same is numbered and delineated upon the recorded plat thereof, unto John E. Sater, of Columbus, [fol. 21] Ohio, Trustee, to be held by him in trust for the following uses and purposes, to-wit:

To receive and collect the rents, issues, income and profits thereof, and after paying therefrom the insurance, taxes, assessments, repairs and charges upon said property and the expenses of said trust, to pay one-half of the net income arising therefrom to Helen Metcalf, of Washington, D. C., in quarterly installments, for and during the full term of her natural life.

Upon the death of the said Helen Metcalf, I hereby authorize and direct the said Trustee to pay from the one-half of the said property (either out of any unpaid money that may be due and owing said Helen Metcalf at the time of her death or from such income as may accrue after her death) the expenses of her last sickness and burial, and if necessary, to provide a suitable tombstone for her grave. Should it be the desire of said Helen Metcalf, or her family, that her body be buried in Greenlawn Cemetery, in which my body is buried, it is my will that her body be there buried.

I authorize and direct said Trustee to pay the other half of the net income arising from said property, share and share alike, in quarterly installments, to Juliet Sessions (a teacher in the public schools of Columbus, Ohio), Elizabeth Sessions (her sister), and Harriet Sessions, of Mount Holyoke, Massachusetts, for and during the lifetime of Helen Metcalf; and upon the death of Helen Metcalf, and the payment of the amounts herein authorized in connection with her last sickness and burial, including the cost of a tomb-[fol. 22] stone, or in case I should survive the said Helen Metcalf, it is my will and I hereby direct that the premises described in this item of my will shall, as soon thereafter as it may be convenient to do so, be conveyed in fee by said Trustee to Juliet Sessions, Elizabeth Sessions, and Harriet Sessions, at which time the trust herein created shall cease, and said Trustee shall then be released from any and all liability therein, and said property shall vest absolutely and in fee simple, share and share alike, in the said Juliet Sessions, Elizabeth Sessions and Harriet Sessions.

In event said Helen Metcalf should survive any of the three (3) beneficiaries named in this item of my will, who, at the time of her death should leave no lawful issue surviving her, it is my will and I hereby direct that the survivors, or survivor, as the case may be, of said three (3) beneficiaries, shall have and receive such portion

of the rents and profits hereinabove provided, and such portion of the real estate as would have been received but for the death of such other beneficiary or beneficiaries as the case may be.

Item VIII. I give and bequeath unto the Public School Library, of Columbus, Ohio, all the books and pamphlets which now go to make up my library.

Item IX. I give and bequeath unto the Columbus Art School all of my prints, engravings and paintings.

Item X. All the rest, residue and remainder of my estate and property, real, personal and mixed, of every nature and description, or wheresoever situate, including any lapsed legacies of which I may die possessed, or to which I may in any way be entitled, I give, [fol. 23] devise and bequeath to the Young Men's Christian Association, of Columbus, Ohio, the Young Women's Christian Association, of Columbus, Berea College, and the American Missionary Association, to be divided equally among them, share and share alike, by my executor hereinafter named. The share *to* which each of the beneficiaries named in this item of my will shall receive, shall be held, used and applied by each of said corporations in such way or manner as may in the judgment of the legally qualified and acting officers of each of said respective corporations best tend to promote and advance the objects defined in their articles of incorporation.

Item XI. In case I should die within one (1) years from this date, it is my will, and I hereby direct, that all the property devised by Item X of this my last will, shall pass to and become the absolute property, in fee simple, share and share alike, of Sarah Lewis (formerly Sarah Wright), Mary Wright Woodnut (now Mary Wright), Item X of this my last will, shall pass to and become the absolute Linn Wright (grandson of Horace Wright) and Helen Jones (daughter of Horace Wright), the beneficiaries named in Item VI of this my last will.

Item XII. I nominate and appoint John E. Sater, of Columbus, Ohio, as the Executor of this, my last Will and Testament, hereby authorizing and empowering said executor to reduce to cash all the property mentioned in Item X of this, my last Will, and to sell, either at public or private sale, on such terms and conditions and at such price or prices, and to such person or persons, as, in his judgment, may be proper, all or any of my real or personal property so mentioned in Item X of this my last will; and to execute and deliver [fol. 24] any and all deeds and conveyances (with or without covenants of warranty as my Executor may deem best) and other papers necessary and proper to vest in the purchaser or purchasers a good title thereto, which purchaser or purchasers shall not be liable for the application of the purchase money of the premises so sold; and to make division and partition of the proceeds arising from the sale of my residuary estate among my residuary legatees within two (2) years after my death, and to control and manage my said residuary estate in the same manner as I could do if living.

I authorize and empower said executor to compromise, adjust, release and discharge, in such manner as he may deem proper, any debts and claims due to or owing by me; to complete or rescind any contracts of whatsoever kind entered into by me, and to collect any and all rents, interest and profits and income of every character arising out of or derived from my residuary estate.

Item XIII. Should any of the beneficiaries under this Will object to the probate thereof, or in any wise directly or indirectly contest, or aid in contesting the same, or any of the provisions thereof, or the distribution of my estate hereunder, or any part hereof, then and in that event, I annul any bequests herein made to any such beneficiary, and it is my will that such beneficiary shall be absolutely barred and cut off from any share in my estate.

In Witness Whereof, I have hereunto subscribed my name to this, my last Will and Testament, at Columbus, Ohio, this 17th day of September, in the year of our Lord one thousand nine hundred and fourteen (1914).

(Signed) Mary J. Sessions.

[fol. 25] The foregoing instrument was signed, acknowledged and declared by the said Mary J. Sessions, as and for her last Will and Testament in our presence, who, in her presence, and at her request, and in the presence of each other, have this day signed our names as witnesses.

(Signed) L. F. Sater, Residing at Columbus, Ohio. (Signed) E. L. Pease, Residing at Columbus, Ohio.

IN THE COURT OF COMMON PLEAS

ENTRIES OF APPEARANCE

The undersigned defendants in the above entitled case waive the issuance and service of summons, and voluntarily enter their appearance herein, and consent to the immediate hearing of said cause.

Mary Wright, L. W. Wright, Helen W. Jones, Sarah Lewis.

Filed April 9, 1921.

Similar Entries of Appearance were duly filed by the following parties: M. B. Cooper, John D. Evans, Annie Helwig. Filed April [fol. 26] 9, 1921. Juliette Sessions, Elizabeth Sessions, Elizabeth Sessions, Executrix for Harriet E. Sessions, per Juliette Sessions. Filed April 9, 1921. American Missionary Association, By Irving C. Gaylord, Treasurer. Edward P. Lyon, Chairman Com. on Finance. Filed April 13, 1921. Berea College, By Mallon & Vordenberg, Attorneys. Filed April 13, 1921. Green Lawn Cemetery Association, By J. B. Wilcox, Secretary. Filed April 14, 1921. John

E. Sater, Trustee under the will of Mary J. Sessions, deceased. Filed April 14, 1921. Helen Metcalf. Filed April 14, 1921. William [fol. 27] P. Metcalf. Filed April 14, 1921. The Board of Education of the Columbus, Ohio, School District, By Charles A. Leach, City Attorney, and Attorney for said Board. Filed April 14, 1921. The Columbus Art Association, By Arnold & Game, R. H. Platt. Filed April 14, 1921. Ora Davis. Filed April 23, 1921.

ENTRY OF FINDINGS AND JUDGMENT—Filed July 20th, 1921

This day this cause came on to be heard upon the petition and the copy of the will attached thereto, which was agreed to be a full and true copy of said will, and all of the defendants having voluntarily entered their appearance in said cause, the same was argued by counsel and submitted to the court, and the court being fully advised, finds that the federal estate tax is a debt against the estate of said decedent which must be paid by the Executor out of the general assets of the estate before making any distribution among the residuary legatees, namely, American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, The [fol. 28] Young Women's Christian Association of Columbus, Ohio; that the legatees and devisees in the will who received specific legacies and devises under the will, are entitled to receive their respective bequests and devises in full, and free from the payment of said estate tax, unless necessary to pay debts, and that the Executor shall not charge to or collect from any of the legatees or devisees under the will, other than said residuary legatees, any amounts paid by him for said federal estate tax.

The court further finds that the costs and expenses of administration are payable out of the general funds in the hands of the executor and are not chargeable against devisees and legatees of specific devises and bequests, and the residuum only, after paying all costs and expenses, is payable to the residuary legatees; but the expenses of repairs, improvements, insurance, taxes and assessments incurred since the death of the testatrix upon the real estate specifically devised, and the charges for services in collecting the rents and making the leases and keeping the property in repair, and other similar services respecting said real estate, are not charges against the general assets in the hands of the executor, but the Executor should charge to and collect from the respective devisees of specific real estate the expenses so incurred by him and the charges for his services on behalf of the respective devisees, each devisee to pay to the Executor the amount of expense incurred and the charge for services made by Executor with respect to such devisee's property.

Said petition is dismissed as to the request marked "D," relating to the collateral inheritance tax law of Ohio, on the ground that this [fol. 29] court in this proceeding has no jurisdiction of such questions.

To which findings and judgment of the court said defendants, The American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, and the Young Women's Christian Association of Columbus, Ohio, and each of them jointly and severally except.

And thereupon the defendants, The American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, and The Young Women's Christian Association of Columbus, Ohio, each filed its separate motion for a new trial and the same was submitted to the Court, and the Court overruled each of said motions, to which each of the parties at the time excepted.

The defendants, The American Missionary Association, Berea College, The Young Men's Christian Association of Columbus, Ohio, and The Young Women's Christian Association of Columbus, Ohio, hereby jointly and each of them severally give notice of their intention to appeal this case to the Court of Appeals; and the Court fixes the penalty of the appeal bond, to be given in case said appeal is perfected, at $500.00.

It is ordered and adjudged by the Court that said Executor pay the costs of this action out of the general assets of said estate.

[fol. 30] IN COURT OF COMMON PLEAS

MOTION OF BEREA COLLEGE TO SET ASIDE THE FINDINGS AND JUDGMENT OF THE COURT HEREIN AND FOR A NEW TRIAL

Now comes the defendant, Berea College, and moves the court to set aside its findings and judgment herein and for a new trial on the following grounds, viz.:

1. That said findings and judgment are not supported by the facts stated in the petition herein and in the last will of Mary J. Sessions, deceased, mentioned in said petition, or by the facts stated either in said petition or in said will.

2. That said findings and judgment are contrary to law.

3. That said findings and judgment should have been in favor of this defendant and of each of the other defendants who are residuary devisees and legatees under the last will of said Mary J. Sessions, deceased.

Booth, Keating, Pomerene & Boulger, Attorneys for Berea College.

In Court of Common Pleas

Motion of the American Missionary Association to Set Aside the Findings and Judgment of the Court Herein and for a New Trial

Now comes the defendant, The American Missionary Association, and moves the court to set aside its findings and judgment herein and for a new trial on the following grounds, viz.:

[fols. 31 & 32] 1. That said findings and judgment are not supported by the facts stated in the petition herein and in the last will of Mary J. Sessions, deceased, mentioned in said petition, or by the facts stated either in said petition or in said will.

2. That said findings and judgment are contrary to law.

3. That said findings and judgment should have been in favor of this defendant and of each of the other defendants who are residuary devisees and legatees under the last will of said Mary J. Sessions, deceased.

Booth, Keating, Pomerene & Boulger, Attorneys for The American Missionary Association.

In Court of Common Pleas

Motion of the Young Men's Christian Association and the Young Women's Christian Association for New Trial

Now come the defendants, The Young Men's Christian Association and The Young Women's Christian Association, and severally move the court to set aside its findings and judgment herein and for a new trial of this cause on the ground that said findings and judgment are not supported by sufficient evidence and are contrary to law.

Webber & Jones and C. A. McCleary, Morton, Irvine & Blanchard, Attorneys for said Defendants.

[fol. 33] Supreme Court of the State of Ohio

[Title omitted]

Certificate of the Chief Justice of the Supreme Court of Ohio [Omitted; printed side p. e]

[fol. 34] TRANSCRIPT OF DOCKET ENTRIES [Omitted; printed side p. a]

[fol. 35] TRANSCRIPT OF JOURNAL ENTRIES [Omitted; printed side p. c]

[fol. 36] CLERK'S CERTIFICATE [Omitted; printed side p. d]

[fols. 37-41] OPINION OF SUPREME COURT OF OHIO—Decided December 29, 1922 [omitted; printed side p. f]

[fol. 42] WRIT OF CERTIORARI AND RETURNS—Filed Sept. 24, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Being informed that there is now pending before you a suit in which the Young Men's Christian Association of Columbus, Ohio, Berea College, and the American Missionary Association, are plaintiffs in error, and Ora Davis et al. are defendants in error, No. 17369, which suit was removed into the said Supreme Court, by virtue of a writ of error to the Court of Appeals of Franklin County, Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United [fol. 43] States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the eighteenth day of September, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 44] [File endorsement omitted.]

[fol. 45] IN THE SUPREME COURT OF THE STATE OF OHIO

No. 17369

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO; Berea College, and The American Missionary Association, Petitioners,

vs.

ORA DAVIS, WILLIAM METCALF, GREENLAWN CEMETERY ASSOCIATION, M. B. Cooper, Annie Helwig, John D. Evans, Sarah Lewis, Mary Wright, Lynn Wright, Ellen Jones, John E. Sater, Trustees under the Will of Mary J. Sessions, Deceased, Helen Metcalf, Juliette Sessions, Elizabeth Sessions, Elizabeth Sessions as Administratrix of the Estate of Harriet Sessions, Deceased, the Board of Education of the City of Columbus, Ohio, School District, the Columbus Art Association, The Young Women's Christian Association, and John E. Sater as Executor of the Last Will and Testament of Mary J. Sessions, Deceased, Respondents.

STIPULATION—Filed Sept. 21, 1923

It is hereby stipulated between the Young Men's Christian Association, of Columbus, Ohio, Berea College, and The American Missionary Association, Plaintiffs in error, against Ora Davis, William Metcalf, Greenlawn Cemetery Association, M. B. Cooper, Annie Helwig, John D. Evans, Sarah Lewis, Mary Wright, Lynn Wright, Ellen Jones, John E. Sater, Trustee under the will of Mary J. Sessions, Deceased, Helen Metcalf, Juliette Sessions, Elizabeth Sessions, Elizabeth Sessions as Administratrix of the Estate of Harriet Sessions, Deceased, The Board of Education of the City of Columbus, Ohio, School District, The Columbus, Art Association, The Young Women's Christian Association, and John E. Sater as Executor of the last will and testament of Mary J. Sessions, Deceased, Defend-[fol. 46] ants in error, that the transcript already filed in the office of the Clerk of the Supreme Court of the United States with the petition for writ of certiorari be taken as a return to said writ dated the 9th day of June, 1923.

Dated this 9th day of June, 1923.

Frank Davis, Jr., Guy W. Mallon, Henry A. Williams, James I. Boulger, Attorneys for Petitioners. Arthur I. Vorys, Attorney for Respondents.

[fol. 47] SUPREME COURT OF OHIO

UNITED STATES OF AMERICA,
State of Ohio, ss:

In obedience to the command of the within writ of certiorari, and in pursuance of the stipulation of the parties, a full, true and complete

copy of which is hereto attached, I hereby certify that the transcript of record filed with the petition for a writ of certiorari in the case of the Young Men's Christian Association, of Columbus, Ohio, et al., vs. Ora Davis et al., No. 17369, is a full, true and complete transcript of all pleadings, proceedings and record entries in said case as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of the State of Ohio at my office in the City of Columbus, Ohio, 21st day of September, 1923.

Seba H. Miller, Clerk of the Supreme Court of the State of Ohio. [Seal of the Supreme Court of the State of Ohio.]

STATE OF OHIO,
City of Columbus, ss:

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the above and foregoing is a full, true and complete copy of the stipulation of the parties as to return to be made to the writ of certiorari in the case of The Young Men's Christian Association of Columbus, Ohio, et al., Petitioners, v. Ora Davis et al., Respondents, No. 17369, as fully and completely as said stipulation remains on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Ohio at my office in the City of Columbus, Ohio, this 21st day of September, 1923.

Seba H. Miller, Clerk of the Supreme Court of the State of Ohio. [Seal of the Supreme Court of the State of Ohio.]

[fol. 48] [File endorsement omitted.]

IN THE

Supreme Court of the United States

No. 249.

October Term, 1923.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION, OF COLUMBUS, OHIO, BEREA COLLEGE, AND THE AMERICAN MISSIONARY ASSOCIATION,
Petitioners,

vs.

ORA DAVIS ET AL.,
Respondents.

BRIEF OF PETITIONERS.

FRANK DAVIS, JR.,
HENRY A. WILLIAMS,
GUY W. MALLON,
JAMES I. BOULGER,
Attorneys for Petitioners.

TOOTHAKER & GOODSPEED, Law Printers, Columbus, Ohio

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IN THE

Supreme Court of the United States

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Petitioners,

vs.

ORA DAVIS ET AL.,
Respondents.

BRIEF OF PETITIONERS.

STATEMENT.

On May 21, 1923, this court, on application of petitioners, granted writ of certiorari to the Supreme Court of Ohio, and this case is now for hearing upon the merits.

The question for determination is the incidence of the federal estate tax paid by the executor of Mary J. Sessions, a citizen of Ohio. Mrs. Sessions died on April 1, 1919, leaving a last will and testament which was executed on September 17, 1914, prior to the enactment of the act giving rise to a federal estate transfer tax, and which was duly probated. In this will, after making certain specific devises and bequests, the testatrix provided by Item X:

> "All the rest, residue and remainder of my estate and property, real, personal and mixed, of every nature and description, or wheresoever situate, including any lapsed legacies of which I may die possessed, or to which I may be in any way entitled, I give, devise and bequeath to the Young Men's Christian Association, of Columbus, Ohio, the Young Women's Christian Association, of Columbus, Ohio, Berea College, and the American Missionary Association, to be divided equally among them share and share alike by my executor hereinafter named * * *." (R., 19.)

It is conceded that the institutions named in the foregoing item, as residuary legatees and devisees, are corporations organized and operated exclusively for religious, charitable and educational purposes, and neither the government nor any of the parties hereto deny that they come within the purview of *paragraph 3 of section* 403 of the federal estate tax law of 1918 authorizing the deduction of the value of the gifts received by them under the will from the gross estate, for the purpose of ascertaining the value of the *net estate*, upon the transfer of which the federal estate tax is imposed.

The executor named in the will deducted from the de-

cedent's gross estate the debts and charges and the amount of the specific devises and bequests for the purpose of ascertaining the value of the residuary estate. When the residuary estate had been thus ascertained, he then deducted from the entire estate the charges, debts and, in compliance with *paragraph* 3, *section* 403, federal estate tax law, the value of the residuary estate devised and bequeathed to the named charitable, religious and educational institutions, and also the exemption of $50,000.00 provided for in *paragraph* 4 *of section* 403 of the federal estate tax law, to determine the value of the net estate upon the transfer of which the tax was imposed under *section* 401 of the federal estate tax law.

It will thus be seen that it was correctly determined that the existence of the *specific devises and bequests gave rise to the tax.* After paying this tax, which amounted approximately to $31,000.00 upon the transfer of the specific devises and bequests, the executor brought an action in the Common Pleas Court of Franklin county, Ohio, for the purpose of obtaining the direction of the court whether the tax should be deducted from the *net estate* which went to the specific devisees and legatees, thus causing it to be taken from the aggregate amount going to the specific devisees and legatees none of whose devises and bequests were deductible from the gross estate under *paragraph* 3, *section* 403, or whether it should be taken from the residuary estate, which had been devised and bequeathed to the charitable, religious and educational institutions named in Item X, notwithstanding the fact that these residuary

devises and bequests were properly deducted from the gross estate for the purpose of arriving at the net estate upon the transfer of which the tax was imposed.

The Common Pleas Court held that the tax was to be treated as a debt of the decedent or of the estate and as such should be paid, as other debts, out of the residuary estate. Without discussing the law the Court of Appeals, while admitting that the question was not free from doubt, affirmed this judgment, and the Supreme Court of Ohio in turn affirmed the decree of the Court of Appeals. (Opinion, R. 4.)

THE STATUTE.

The earlier form of the statute must be ignored, as the provisions for the deductions that are here the vital and governing elements, were inserted, by amendment, in what is known as the revenue act of 1918, effective February 25, 1919, and which is the law under which the tax in question was imposed.

Section 401 of the federal tax of 1918 (40 Stat. 1096; section 6336¾b, United States Compiled Statutes, Supplement 1919), provides:

> "A tax equal to the sum of the following percentages of the value of the *net estate* (determined as provided in section 403) is hereby imposed *upon the transfer of the net estate* of every decedent dying after the passage of this act, whether a resident or non-resident of the United States;" (here follow the percentages).

Section 403 (40 Stat. 1098; section 6336¾d, United States Compiled Statutes, Supplement 1919) provides

for the determination of the value of the *net estate for the purpose of the act*, by deducting from the value of the gross estate:

(1) Amounts for funeral and administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate when not compensated for by insurance or otherwise, amounts reasonably required and expended for the support, during the settlement of the estate, of dependents upon the decedent, and exclusive of income taxes upon income received after the death of the decedent, or estate, succession, legacy or inheritance taxes.

(2) An amount equal to the value at the time of the decedent's death of any property which can be identified as having been received by the decedent as a share in the estate of one who died within five years prior to the death of the decedent, or acquired by the decedent in exchange for property so received, if the estate tax under the Act of 1917 or under the act under consideration is collected from the estate and is included in the decedent's gross estate.

(3) "*The amount of all bequests, legacies, devises or gifts* * * * *to or for use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes,* * * *."

Section 404 (40 Stat. 1099; section 6336¾c, United States Compiled Statutes, Supplement 1919) is important to consider as disclosing congressional intent. It provides:

"The executor shall * * * file a return * * * setting forth * * * (c) the value of the *net estate* of the decedent as defined in section 403; and (d) *the tax paid or payable thereon* * * *."

THE QUESTION.

The question for consideration is whether the federal estate tax, which is "*imposed upon the transfer of the net estate,*" may be paid out of the devises and bequests to corporations organized and operated exclusively for religious, charitable and educational purposes, when the statute imposing the tax expressly provides that such devises and bequests must be deducted from the estate, in order to arrive at the transfer which is taxed, and when, in determining the tax, the amount going to these institutions may not be considered. Did Congress intend that these bequests and devises should be deducted merely to reduce the tax and then be recalled for the purpose of paying the tax, or did it intend what the statute plainly provides, that the federal estate tax does not apply to bequests to charitable institutions—that such bequests are exempt from direct or indirect payment of, or contribution to, the tax?

That the question may not be obscured by extraneous issues, we desire to add that we do not contend that when the tax is paid out of *the net estate* it may not ultimately be taken from the residuary part of such net estate; nor do we urge that the tax must necessarily be prorated among the legatees taking the net estate as held in *Fuller v. Gale*, 75 N. H., 544.

SPECIFICATION OF ERRORS.

The fundamental errors underlying the decisions of the Ohio courts are:

(a) They treated the tax as a debt of the decedent, or of the estate, when it could be neither, as death being "the generating source" of the tax it could not be a debt of the decedent for it did not arise until her death; it could not be a debt of the *"estate"* for neither the existence nor the passing of the *"estate"* gave rise to the tax. It was not because the decedent left an estate that there was a tax, but because she transferred certain parts of it to the specific legatees and devisees—in other words *it was because she transmitted the net estate that a tax was imposed.* Had she left all of which she died possessed to the residuary legatees there would have been no tax because there would have been no estate.

(b) They entirely ignored the intention of Congress in enacting *paragraph* 3, *section* 403, federal estate tax law, which was clearly designed to relieve the institutions therein designated from direct or indirect contribution to the tax, *the incidence of which is placed upon the transfer of the net estate of which these residuary legatees and devisees took no part.*

(c) They also overlooked the fact that the construction by them adopted renders ineffective and meaningless *paragraph* 3 *of section* 403.

ARGUMENT.

The residuary legatees in this case contend that the federal estate transfer tax, being imposed upon the *transfer of the net estate,* must be collected *or taken from the net estate,* and, as their devisees and bequests *form no part of the net estate,* but on the contrary must be deducted from the aggregate estate before the transfer is taxed, the gifts to them cannot be diminished by or charged with the tax; that in providing for the deduction of such gifts before the value for transfer tax purposes is ascertained, Congress clearly intended to free such legacies and devises from contribution to the tax; and that *within the purview of the statute, the devises and bequests were never transferred, formed no part of the transfer taxed and had no existence under the taxing law—in other words Congress taxes no transfers to corporations specified in paragraph* 3, *section* 403, *and as the gifts to them are taken out of the estate for tax assessing purposes, they should not be brought back into it for the purpose of paying the tax.*

Thoroughly to comprehend the application of this act, it is important to understand its history and the underlying theory of taxation upon which it is based. This has nowhere been more clearly explained and keenly analyzed than in the illuminating opinion of Mr. Justice White in *Knowlton v. Moore,* 178 U. S., 41. No one can read this decision without coming to the conclusion that the tax under discussion is a *net estate transfer, rather*

than inheritance tax, and that *it is not* as the Supreme Court of Ohio assumed, *imposed upon the right of the decedent to transfer his property, but on the contrary is upon the transfer or transmission of the net estate.* Failure to recognize this distinction led the Ohio courts into the error of which we complain. To maintain that the tax is on the right of the decedent to transfer his property would render the act subject to constitutional attack, as the federal government does not grant this right and has no control over it. In fact this was a ground of attack on the law in *Trust Company v. Eisner*, 256 U. S., 345, and was urged against it by Messrs. Gleason and Otis, on page 554 of the second edition of their work on *Inheritance Taxation* wherein they say:

> "But the right to transfer at death is not a privilege bestowed by the federal government. It is not one of the powers delegated to Congress by the states in the national constitution."

Mr. Justice White demonstrates in *Knowlton v. Moore*, 178 U. S., 41, 58 et seq., that, while state taxes may be imposed upon the right of the decedent to transmit his estate, a federal tax is not upon the power of the state to regulate the devolution of property but is upon the transmission of the inheritance. In *Greiner v. Lewellyn*, 258 U. S., 348, it is said the federal government "has the power to tax the transfer of the net assets," which accurately defines the power exercised here.

Again, even if we assume that the tax is on the right of the decedent to transmit, *it is not upon his right to transfer his estate*, as the Ohio courts assume, that the

tax is based, *but rather upon his right to transmit his net estate.*

The correct theory of the tax is well stated in *Lederer v. Northern Trust Company,* 262 Fed., 52 (certiorari denied 253 U. S., 487) in the following language:

> "It concerns generally the federal tax, which both parties concede to be an estate tax, that is, a tax that relates not to an interest to which some person has succeeded by inheritance, bequest or devise, *but an interest which has ceased by reason of death; and it is imposed not upon the interest of the recent owner or upon his privilege to dispose of it, but upon the transfer of the interest in its devolution.*" (pp. 53, 54.)

The Tax Should be Deducted From the Aggregate Net Estate in its Devolution.

Section 401 imposes the tax upon the *transfer of the net estate and not upon the transfer of the estate generally;* therefore whether it be the power to transmit, or accurately speaking, the transfer of interest in its devolution, *we must look to the thing that the statute contemplates, as transferred, which is the net estate,* for the purpose of ascertaining the incidence of the tax. Congress did not intend to tax the transfer of one thing and require the payment of the tax out of something else.

By *paragraph* 3, *section* 403, Congress have provided that the "amount of all bequests, legacies, devises or gifts * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes," shall be deducted from the gross estate in order to arrive at the

transmission tax. *The transfer of the interest in its devolution that is taxed is not what goes to these corporations, but what remains in the net estate.* Congress refused to tax the transmission of the estate to these institutions; the decedent may give them his whole estate, and there will be no tax upon the value of what they take. The federal estate transfer tax only becomes effective when the decedent goes further than to make gifts to such corporations and exercises his right and power to pass his estate to others; it is only in the latter event that the tax arises. What is no part of the net estate—the residuary devises and bequests here—is left out of consideration when the tax is levied and collected. To label these devises and bequests residuary and then to insist that because of this the tax must be taken from them, is to overlook the theory and purpose of the law and the intent of Congress.

The Net Estate, Giving Rise to the Tax, Should be Charged with its Payment.

As the transfer of the net estate gives rise to the tax it is only logical to assume that the *net estate* must be chargeable with its payment, *the existence of the rest of the estate is not recognized in the statute.* The tax being levied upon the devolution of this part, it alone should yield exaction to the government.

If the tax is upon the transfer, it should be taken from what is transferred within the meaning of the law, and not from something that Congress has expressly taken out of the transfer. Ultimately it must come (a) from

the transferor, which cannot here be the case because death being "its generating source" and the "transmission from the dead" being that on which the tax is rested (*Knowlton v. Moore, supra*, pages 56, 57) it cannot arise until the death of the transferor (*Hampton v. Hampton*, 188 Ky., 199, 202, 10 A. L. R., 515, 518), or (b) from the thing transferred or from the transferee. For convenience it is here taken out of the thing transferred, which of course is the net estate; and thus it eventually falls upon those who take *the aggregate net estate*—in other words as a charge against the net estate it is deducted before each individual secures his share of the net estate, differing in this respect from an inheritance tax where the tax is taken from the interest passing to the individual legatee.

The clearest and most graphic description of this tax is that given by the Supreme Court of Oregon in *Re Estate of Inman*, 101 Ore., 182, 16 A. L. R., 675, 199 Pac., 615, wherein it is said:

> "Every estate within the embrace of the federal statute must pass through the federal government's toll gate before it can be divided, and the several portions into which it is divided sent onward to their respective destinations. Figuratively speaking, this toll gate is erected and maintained *at the place where the net estate of the decedent is assembled* preparatory to its division and distribution; but, *before the net estate* can be divided and pass through the toll gate, a toll must be paid to the national government. *This toll is fixed and collected upon the assembled net estate considered as a unit*, without regard to the different portions into which it is to be divided, and without regard to the different roads over which the several portions are to go after passing through the toll gate, and without regard to the destination of the different portions."

Legislative Intent Expressed in the Act.

The manifest congressional intent is clearly expressed by *paragraph 3, section* 403, requiring the deduction from the gross estate of these devises and bequests. Originally the law contained no such provision and when this amendment was passed Congress must have contemplated that it would inure to the benefit of those specifically described and whose devises and bequests were to be deducted. The object of the amendment was to accord an exemption from the tax to institutions of the designated classes, and not to relieve legatees and devisees for whom no exemption was provided and gifts to whom were to remain within the net estate.

Opinion Supreme Court of Ohio.

This opinion will be found on page 4, et seq., of the record. As their premise the court assume that which is the real point in controversy, viz: that *the tax is a charge against the estate;* the purpose being, to use the words of the court, "to enact a revenue raiser, which should impose a charge or excise *upon the decedent's right to direct or control the transfer of his estate;*" hence "the *estate* must be considered as a whole without regard to the nature, character or amount of the legacies and bequests." The evident idea of the court was that, as the charge was upon the right to transfer, it must be a charge against the estate.

The fallacies underlying this concept are obvious:

(a) the charge is *not upon any right of decedent;* state laws may be upheld on this theory because the state confers or permits the exercise of this power by the individual, and Congress cannot constitutionally limit or interfere with this right of the state. It was upon the hypothesis assumed by the Ohio court that the inheritance tax of 1898 was attacked, and, in *Knowlton v. Moore,* 178 U. S., 41, this court demonstrated that the tax was not imposed upon the power of the state to regulate the devolution of the property but upon the *transmission* or receipt (*Greiner v. Lewellyn,* 258 U. S., 348). The same theory was made the basis of an attack upon the present law, as appears from the briefs in *Trust Co. v. Eisner,* 256 U. S., 345, and was evidently repudiated by this court; (b) even if the tax be upon the *right* of the decedent it is not upon his right "to control or direct the transfer of his *estate,*" for by its plain terms the law only affects *his right to transfer his net estate,* and therefore the tax should be deducted *from the net estate,* not the "estate."

The court refer to the will of the testator, but as there was no provision in the will, (which was executed before the passage of the statute) dealing with this tax, this element must be disregarded. (*Plunket v. Old Colony Trust Co.,* 233 Mass., 471, last paragraph.) While there may be a presumption, as the court say, that a specific legacy has priority over residuary devises and bequests, this doctrine obtains only where *charges against the entire estate* are being considered. Here we have a statute that fixes this charge *not upon the estate* but upon

the transfer of the *net estate*. It may be that *if the residuary bequests were part of the net estate the rule announced by the court would be applicable but such is not the case.*

The court regard it as "a strange legal paradox" to hold residuary devises prior to those that are specific. This we respectfully urge is not here the question. *The federal law has expressly conferred upon designated corporations the privilege of exclusion from the taxed transfer;* Congress must have intended by this to favor them, as they are usually the subject of legislative favor, and the only way in which this favor may be given effect is by freeing them from direct or indirect payment of the tax. Thus the question is not the priority of bounties, *but the effect of the statute in relieving prescribed institutions from the tax.* Shall a tax created by the transfer of a net estate, give rise to a charge that must be paid by those taking no part of the net estate? When Congress took these bequests from the net estate, they effectually freed them from the tax.

The court quote part of *section* 408 (40 Stat., 1110) but through inadvertence separate the quotation from its context by a period instead of a comma. This section provides for the collection of the tax and contribution from or marshalling of persons subject to equal or prior liability for the tax, "it being the purpose and intent of this statute that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before the distribution." (*Trust Co. v. Eisner*, 256 U. S., 347.) It is noteworthy that this

section recognizes that the tax is not ultimately to be assessed upon the *estate* because it provides for recovery of a proportion of the tax from beneficiaries of insurance policies, who would take nothing from what is legally understood to be the decedent's estate. It also connotes that there may be priority of obligation to pay the tax (*Hampton v. Hampton*, 188 Ky., 199; 10 A. L. R., 514). In any event it is but an administrative feature of the law to insure prompt and full payment to the government without compelling the treasury department to follow the property into the hands of the donees. (*Scholey v. Rew*, 23 Wall., 331, 347; *Re Inman*, 101 Ore., 182, 16 A. L. R., 675, 681; *Hampton v. Hampton, supra; Matter of Gihon*, 169 N. Y., 443, 447.) It certainly does no more than provide for the collection rather than the incidence of the tax. To require a tax to be paid before an estate is distributed does not fix, or even imply, which part of that estate should eventually bear the tax; that question must be determined from consideration of the provisions of the act creating the tax and providing for the deductions.

The cases relied upon by the court to sustain their view make clear the distinction that the court failed to note.

Re Hamlin, 226 N. Y., 407, and *Plunket v. Old Colony Trust Co.*, 233 Mass., 471, both arose under the act of 1916 and consequently the courts did not consider whether devises *that formed no part of the net estate* could be forced to pay the tax. All the courts held was that *when residuary bequests and devises were part of the net estate* the federal tax should be taken out of these

residuary gifts—a proposition we do not dispute. The New York court quotes Mr. Kitchen, who presented the statute to Congress, to the point "we simply levy on the *net estate*" and in the Massachusetts case it is said the statute "looks only to the net estate itself as defined," "an estate tax is levied upon the net estate transferred," which view is thus expressed in the later case of *Old Colony Trust Co. v. Treasurer and Receiver General,* 238 Mass., 544, 16 A. L. R., 689, 131 N. E., 321, 324; "such a tax is a charge upon the net estate transferred by death;" these quotations substantiating our view.

United States v. Perkins, 163 U. S., 625, was construed in *People v. Bemis,* 68 Colo., 48, as being applicable to the statute here under consideration because both used the words "imposed upon the transfer." The former recognized the right of the state to require contribution before a bequest could take effect. Apply that rule here and we find that the contribution is required of the *net estate before it may pass.* It is very clear, however, that the law there construed provided for an *inheritance tax,* and hence it would not here be applicable. *People v. Bemis* marks the distinction between estate and inheritance taxes, holding that the federal tax should be deducted before the state inheritance tax is computed. The question here raised was not before that court and does not even appear as *obiter* in the opinion.

Finally, if the instant decision is correct, *section* 403, *paragraph* 3, is meaningless, except merely to reduce the federal tax, (and in view of the history of the law was certainly not congressional intent) unless *the whole estate goes to the exempt institutions, which surely is not the only instance in which the exemption is to be effective.*

The Decision of the Courts Below Subverts the Intent Expressed in the Statutory Provision for Deduction of Legacies to Petitioners.

A careful study of the statute and the decision of the Supreme Court of Ohio demonstrates that if this decision be correct *paragraph* 3, *section* 403, providing for the deduction of these bequests from the gross estate, accomplishes practically nothing, except a reduction in the federal tax, *unless the whole estate goes to institutions described in paragraph* 3, *section* 403, which cannot of course be the case, as Congress would not pass an act that would only relieve these institutions from taxation when they received the whole estate and at the same time subject them to the tax when they received less than the whole.

In providing for these deductions Congress could have had only two objects, (a) to reduce the amount of the tax, which certainly was not designed, as it was the intent of the law to produce revenue and there could have been no purpose to reduce this revenue merely because there were devises and bequests to these institutions if the institutions were not to be the sole beneficiaries of the deductions; (b) to relieve these institutions from being called upon to pay the tax.

Under the Ohio ruling, of course if the whole estate went to these institutions there would be no tax, but this is the only case in which they would benefit by the statutory deduction. Take for illustration the present case: The deduction reduced the value of the net estate and, the

percentage being upon this, it is true that the tax is not so much as if the residuary estate did not go to these corporations, but this lessening of the tax is not the benefit intended to be conferred by Congress because the tax is on the transfer of the net estate and there has been no reduction of the tax but merely a diminution of the thing taxed. It is not because of the deduction that the tax is less but rather because the tax is based upon the value of the net estate of which these devises and bequests are no part. It has been said, however, that this suit must benefit the residuary legatees as they are not called upon to pay as much as if there were no reduction of the net estate. While this is in a sense true, it is not such real and direct advantage as Congress intended to confer upon them. Furthermore it is not an advantage peculiar to these legatees but may benefit others as well, as we shall hereafter show. *The object of Congress was entirely to relieve them from the direct or indirect incidence of the tax. To call upon them to pay the tax, whether it be large or small, frustrates this obvious intent.*

One only carries the argument of opposing counsel to its logical extent when we illustrate with a case *where specific devises and bequests are to charitable institutions and the residuary estate goes to others whose legacies and devises are not deductible.* In this case the residuary legatees pay a tax, but that tax is much less than it otherwise would be because the devises and bequests to the specific legatees and devisees are deductible, thereby reducing the value of the net estate and the tax.

It will thus be seen that the mere reduction in tax, following the argument of opposing counsel, inures to the benefit of those called upon to pay the tax, whether they come within the provisions of *paragraph 3 of section* 403 or whether they do not; hence the mere fact that the tax is lowered by reason of the deduction cannot be said to be a distinctive benefit to the charitable institution because such benefit may inure to others, dependent upon whether they are specific or residuary legatees, which should disclose that the mere fact that the tax becomes smaller because of this deduction is no reason for asserting that Congress thereby exclusively benefit the charitable institution; and it also makes patent the fact that Congress must have intended something different from this by providing for this deduction, as, *when corporations of the class of petitioners were specifically singled out and distinguished in the statute, this was for the purpose of according them an advantage not shared by those not classified with them.*

It is quite true that under the Ohio ruling corporations described in *paragraph* 3, *section* 403, would not be called upon for the tax if their legacies were specific and the legacies comprising the net estate were residuary, but, according to the reasoning of the court, this does not follow from the law but because of the holding of the court that the residuary estate, rather than specific legatees, should pay; if this is true, then the provision for deduction would be unnecessary to relieve these institutions from the tax in this instance because they would be relieved anyhow. Upon the hypothesis of the Ohio courts,

paragraph three would accomplish nothing in such cases, and would be of no significance.

If the entire estate were specifically bequeathed, the tax, under the Ohio ruling, being a charge against the general estate, would be deducted from the entire estate and consequently it would diminish the share of each legatee. If half of such an estate went to institutions described in *paragraph* 3, *section* 403, the net estate would be thereby reduced and the tax lowered, but nevertheless, in the final analysis, these institutions would pay one-half of this tax and the other non-exempt legatees would pay the other half, if the tax were a charge against the entire estate; consequently the latter class would have their share of the tax lowered to the same extent as would the charitable institutions, which again develops that, by the Ohio doctrine, the benefits of *paragraph* 3, *section* 403, *are not confined to the corporations therein named but are shared equally with others.* Congress did not intend that, by providing these deductions, the advantages thereof should be shared by others than those included within the described classes. There was no design to reduce the tax that would ultimately come from gifts to those whose legacies and devises were not deductible from the net estate.

If what went to these corporations in the foregoing illustration had been specifically given to those not described *in paragraph* 3, then the net estate would be larger and the tax higher; and the proportionate share of the legatees in the tax would be the same although the actual amount taken from each share would be larger;

consequently the government would receive a greater tax. Yet, when we consider the non-exempt classes, there is no reason why Congress would require a larger contribution from them in the one case than in the other, *as their individual situation would be the same in each instance.* Why would Congress provide that the individual should have his share in the estate reduced to a lesser extent merely because he was named as joint legatee with a corporation operated for charitable, religious or educational purposes? Why would governmental revenue be reduced when the reduction would benefit those whose devises and bequests could not be deducted from the estate for the purpose of reducing the tax?

Assume that part of the residuary estate here went to non-exempt classes; that part taken by petitioners would reduce the tax, by lessening the net estate; yet both deductible and indeductible legacies must bear their proportionate share of the tax. Here, again, we should have a reduction of tax that would inure to the benefit of those for whom Congress had provided no exemption.

For final illustration on this point, let us give consideration to the view of the government, in *Edwards v. Slocum,* 287 Fed., 651, that there can be no ascertained residuary estate until the estate tax is paid, and therefore, as the tax must come from this residuum, the residuary legatees do not get the tax and the *amount deducted* under paragraph 3 *should be the residuary estate less the tax, or what they actually received;* otherwise the tax is deducted from the estate in order to estimate the tax, which is contrary to the law.

If this view be correct it will be observed that in the instant case the net estate must be increased by the amount of the tax, because the deduction on account of these devises and bequests must be reduced by the tax taken from this part of the estate, consequently the tax is increased. If what went to the residuary devisees and legatees had been specifically devised and bequeathed and the residuary estate had gone to the specific legatees and devisees, the net estate would have been the sum of these residuary legacies and devises and the tax would be estimated on this amount. As the tax would not come from the share of these corporations, the full sum going to them would be deductible without any increase of the net estate, and the tax would not thus be increased.

It will thus be seen that when the tax comes from the residuary estate, *it is larger when the residuum goes to charitable institutions than when it does not, and hence if such institutions take the residuary estate they would pay more than would individuals taking the residuary estate, where the gifts to charity were specific; and this even though the estate were of the same size and, without considering the tax, individuals and charities received the same amount in each instance.*

Significance of Imposition on "Transfer of the Net Estate,"

We must be mindful of the fact that the "transfer of the net estate" is the subject of the tax and that Congress must have intended by requiring the deduction by the amount of these devises and bequests, in order to

arrive at the net estate, that some exclusive and peculiar advantage should result to the legatees and devisees whose shares were thus to be deducted. Such advantage can only ensue if the tax comes from the net estate. By imposing it on the transfer of the net estate, those whose gifts are deducted must be considered as being without the purview of the law, and their interests have no existence for any tax purpose. No inconsistency, discrimination among the same classes, or anomaly follows our interpretation, because if the tax is taken from the net estate in the aggregate, we shall always have not only a fixed net estate but we shall consistently have contribution from this net estate and from nothing else.

Interpretation Given Statute to be Avoided as Involving Inconvenience and Inequality.

It has been pointed out in *Knowlton v. Moore, supra,* that a construction of a statute occasioning great inconvenience, injustice or inequality must be avoided. Yet the interpretation of the Supreme Court of Ohio will result in numerous anomalies among which we may mention:

(a) Had plaintiffs in error received the entire estate, there would have been no net estate transferred and no tax, and yet because others have been provided for by the testatrix, plaintiffs in error must pay a tax;

(b) if the legacies were all specific and none to exempt corporations, the net estate would be larger and the tax proportionately higher because of the progressive rate, than if half went to such exempt corporations, in which

event these exempt corporations would pay one-half the tax. This shows that estates of the same value would be differently assessed and that, after lessening the net estate, because of paragraph 3, the charitable institutions would be called upon for a tax imposed upon the transfer of the half they did not receive, i. e. *the net estate.* The same inconsistent results follow if the residuary estate on the one hand goes to those whose bequests are part of the net estate, and on the other, partly to such persons and partly to charitable institutions;

(c) not only is the amount of the tax different in each of the foregoing cases but the specific legatees named in a will containing specific bequests to charity pay less than do legatees receiving the same amount under a will containing no legacies to charity but disposing of an estate to favor a legatee merely because he was named in a will of the same value. Congress could not have intended containing charitable bequests.

(d) If conditions were reversed and petitioners took specific legacies and the specific legatees the residuary estate, the latter would pay less than is demanded from the petitioners, if the contention of the government in *Edwards v. Slocum* is correct.

(e) All of the objections to the governmental view, which were the real basis of the decision in *Slocum v. Edwards, supra,* disappear, if our interpretation be adopted.

None of these inconsistencies follow the adoption of the construction for which we contend, because under it the tax is imposed on the transfer of the net estate and

must come out of this in its devolution. Hence the incidence of the tax is upon the net estate from which it must come. All net estates of equal value will pay the same tax, which harmonizes with the language and intent of the statute and the net estate is the object of the tax. It does not call for deductions to estimate the tax and then require that the tax shall be taken from these deductions which are treated in the act as no part of the transfer but which it is insisted should by construction be made part of the estate to pay the tax originating on another part. Nor does it call for the application of abstruse algebraic formula to estimate the tax, which was urged upon the court by the government in *Edwards v. Slocum,* 287 Fed., 651, and of which the court said: "Congress intended a simpler method—one that a plain man could understand. Algebraic formulae are not lightly to be imputed to the legislators." (p. 654.) If the tax be taken from the aggregate net estate, this question cannot arise as the charitable donations go to the legatees without reduction on account of the tax, and hence the amount they receive is not an uncertain sum; nor is the net estate "to receive augmentation by an unknown amount which renders its own figure unknown" (p. 653); that is if the tax comes from the deductible gift that gift is reduced by the tax, and the deduction thereby reduced, which again increases and so on *ad infinitum,* which, say the court, "baffles arithmetic" and requires "algebraic formulae."

Fallacy of Contention that "Net Estate" and "Value of Net Estate" Embrace Different Elements.

Realizing the inconsistency of imposing a tax on the transfer of the net estate and then taking the tax from what is no part of the net estate, opposing counsel argued in the Ohio courts that the tax is based upon the "*value*" of the net estate and that "*net estate*" and "*value of the net estate*" are composed of different elements; that by "net estate" Congress refers to the net estate known to common law which would include gifts to institutions mentioned in *paragraph* 3, *section* 403, and upon the transfer of this imposed the tax; while "value" of the net estate is an arbitrary thing designed for tax computation purposes. The answers to this are obvious:

(a) Congress used the word "*value*" in *section* 403 because, to apply percentages there must be reduction to a monetary basis in order to make the law convenient of operation—the government wants no division in kind; no percentage of stock, cattle, horses, swine and real estate, but cash.

(b) Why would Congress impose a tax on the transfer of the net estate and then apply its tax percentages to an arbitrary valuation that would not include the property comprehended within the term "net estate"?

(c) That Congress intended that the words "net estate" should mean what is left after making the deductions called for by *section* 403 is apparent from the language used in fixing the progressive per centum in *section* 401, wherein it deals expressly with a designated

per centum *"of the amount by which the net estate exceeds" a specified sum.* Note that here Congress speaks of the net estate and not the value of the net estate; had it been the intention to distinguish between value of the net estate and net estate it is manifest that Congress would have here used the word "value," instead of which the two expressions are used interchangeably when it is possible intelligibly to do so.

(d) If opposing counsel were correct then we should find this absurdity and inconsistency in the first sentence of section 401, (a) the percentage would be upon a value obtained by deducting the charitable bequests, but (b) the tax would be upon the entire estate less the charges. If the estate after the charges were paid were $1,000,000 which went to a charitable institution, there would be no basis for a percentage, but yet, as the tax is imposed upon the transfer of the net estate, which counsel say includes the charitable bequest, it must follow that this transfer should then be taxed; thus under one clause there must be a tax while under the other there is no way of estimating the tax. If the net estate must include the charitable bequest then, to use the foregoing illustration, we should have a $1,000,000 net estate upon the transfer of which no per centum could be figured.

(e) Further demonstrating that such is not the effect of the law we have but to examine the act of 1921 (*section* 400), wherein it is provided:

> "The term 'net estate' means net estate as determined under the provisions of section 403."

There has been no change in theory, principle or practical operation of the tax between the acts of 1918 and 1921, the salient language being in all essential features the same; hence there can be no doubt that "net estate" includes the same property, and that alone, upon which the "value of the net estate" is based. Subsequent legislative interpretation is entitled to weight:

Bowling v. United States, 233 U. S., 528-535, 536;
New York P. & N. R. Co. v. Peninsular Produce Exch., 240 U. S., 34-39.

Holdings that Tax is Deductible from the Net Estate.

While the question has not been directly decided, nevertheless the language of the state courts in discussing the federal estate tax seems to be directly in point in principle.

In *Re Miller*, 16 A. L. R., 694, 195 Pac., 413, it is said that the federal statute "entitles the tax 'an estate tax' and in terms *imposes it upon the net estate of the decedent as a unit.*"

In *Bugbee v. Roebling*, 94 N. J. Law, 438, 111 Atl., 29, it was held that in ascertaining the state tax the amount of the federal tax must be deducted. In this case Judge Bergen, in concurring, speaks of the federal tax as "the amount assessed by the officers of the federal government as a tax for death duties, *because the net estate to be distributed is reduced to that extent.*"

In *Ebersole v. McGrath*, 271 Fed., 995, Judge Peck, in discussing the inapplicability of the tax to property passing under appointment by donee of a power, says of the federal net estate transfer tax:

"The net estate only is its object." (page 1000.)

In *Old Colony Trust Co. v. Treasurer and Receiver General*, 238 Mass., 544, 131 N. E., 321, 16 A. L. R., 689, it is said on page 324 (N. E. Report), in discussing the federal estate tax:

> "In its nature such a tax is a *charge upon the net estate transferred by death.*"

In *Corbin v. Townsend*, 92 Conn., 501, 103 Atl., 647, the court considered the question of the right to deduct the federal tax and taxes paid in other states from the estate before computing the Connecticut succession tax, holding that such taxes were properly deductible before estimating the Connecticut tax. In the opinion the court say:

> "The federal act of 1916 imposes a tax payable out of the estate before distribution, thus differing from the federal inheritance tax of 1908, payable by the individual beneficiaries. It is not a tax upon specific legacies nor upon *residuary legatees. It is taken from the net estate* 'before distributive shares are determined rather than off the distributive shares.'" (page 505.)

In *State v. First Calumet Trust & Savings Bank*, 125 N. E., 200, 71 Ind. App., 467, 471 (1919), the state appealed from a judgment assessing the state inheritance tax after deduction of debts and the federal estate tax. In affirming the lower court the Appellate Court say of the federal tax:

> "The tax paid to the federal government *upon the net estate* before distribution cannot in any sense be held to have been part of the respective legatees or distributees, and the market value of such beneficial interest must of necessity be the value after deduct-

ing the federal tax, *the same having been deducted from the net estate* before distribution was made thereof, and it necessarily follows that the state inheritance tax should be computed after deducing *from the net estate the amount of such federal estate tax.*" (page 202.)

The opinion of the Orphans Court approved and appearing in *Re Knight's Estate*, 261 Pa., 537, 104 Atl., 765, holds, in allowing the deduction of the federal tax before ascertainment of the state inheritance tax:

"It [the federal estate tax] is denominated an estate tax, not a tax upon the succession or inheritance, and *it is charged upon and payable out of the net estate of the decedent.*" (page 538.)

In *People v. Pasfield*, 284 Ill., 450, the court, in deciding that the federal estate tax of 1916 must be deducted before computing the state inheritance tax, say that the federal estate tax

"levies a duty, as above shown, *on the entire net estate* before any distribution is made to the legatees or distributees."

In *Hampton v. Hampton*, 10 A. L. R., 514, 188 Ky., 199, 202, 221 S. W., 496, the court in holding that the federal estate tax does not affect the portion of an estate going to the widow under the laws of the state and that the estate tax was not payable solely out of the personal property, say:

"*The tax is imposed upon the net estate.*" (page 516, A. L. R.)

Distinction Between Decisions Relied Upon by Opposing Counsel and Case at Bar.

It has been urged, and the Supreme Court of Ohio takes the view, that *Hamlin v. Wellington*, 226 N. Y., 404, and *Plunket v. Old Colony Trust Company*, 233 Mass., 471, are in point. Neither of these cases has any pertinency as will appear from an analysis.

Hamlin v. Wellington, 226 N. Y., 404, 124 N. E., 4, presents a situation wherein the federal act of 1916 governs, as the decedent died on January 3, 1917, which was before the federal estate tax law was amended. As a consequence of this the foregoing case did not involve a consideration of the payment of the federal estate tax by residuary legatees or devisees *whose bequests and devises were to be deducted from the gross estate* in order to arrive at the net estate. In other words when the facts arose on which the New York decision was predicated, charitable, religious, scientific, literary and educational bequests and devises were not to be deducted from the gross estate in order to ascertain the net estate on the transfer of which the federal tax is levied. All that the court held in this case was that when the residuary devises and bequests *were part of the net estate, the federal estate tax should be paid out of the residuary part of this net estate.* An examination of the case will disclose that the question we here make did not arise and could not possibly have arisen because not only was the statute different from the one governing the instant case but the residuary legatees and devisees did not even

come within the class whose devises and bequests are to be deducted under the present law. We call attention, however, to the history of the original act as it appears in the opinion in this case and especially to the language of Mr. Kitchen, the chairman of the committee recommending the bill, who said:

> "We do not follow the beneficiaries and say how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, *but we simply levy on the net estate.*"

This language sustains our position that the tax being levied on the net estate it must be payable out of the net estate—in other words, when a tax is levied on a particular estate it must be paid out of that estate. Of course the statement of Mr. Kitchen is not quite accurate because the levy is on the transfer of the net estate rather than on the net estate itself, but it makes clear legislative intent that the tax should come from the aggregate net estate before its distribution. When the court uses the language that the tax is "payable by the estate," it unquestionably means that it is payable by the estate upon the transfer of which it is levied, viz., the net estate; furthermore when this case was decided there was not the same difference between estate and net estate as exists in the law under consideration.

Plunket v. Old Colony Trust Company, 233 Mass., 471, 124 N. E., 265, is distinguishable on the same grounds as is *Hamlin v. Wellington, supra.* The decedent died on October 25, 1917, and the bequests and devises were not to charitable, religious, scientific, literary or educational

institutions. In the Massachusetts case the court distinctly states that the tax is imposed upon the transfer of the net estate and uses the following very significant language:

> "The statute ignores utterly the disposition made of the estate by the testator or by the law as to intestate property, *and looks only to the net estate itself as defined.*"

It is pointed out that the words "net estate" are used uniformly in the operative parts of the act to the exclusion of phrases of other significance. It is also said:

> "An estate tax is imposed upon the net estate transferred by death."

The later case of *Old Colony Trust Co. v. Treasurer and Receiver General, supra,* reiterates this doctrine.

It will be seen from an analysis of the two foregoing cases that the question there arising was whether the estate tax was on the particular devises, bequests or distributive shares or upon the net estate, and that the courts in taking the latter view made no ruling that is pertinent to the case at bar, but apparently recognized the doctrine for which we contend, viz., that this tax should be payable out of the net estate, and *when part of that net estate* went to residuary legatees and devisees then the payment of the tax should come out of such residuary devises and bequests rather than from the specific devises and bequests; but it must at all times be borne in mind that this was only true *because the residuary legatees and devisees received part of the net estate.*

Much stress has been laid by opposing counsel upon

Re Newton's Estate, 74 Pa. Super. Ct. Rep., 361, which is readily distinguishable from the instant case in that it arose under the act of 1916 where there were no such deductions as are authorized under the law the court here is construing. It is interesting to note that in principle it follows our theory. The court says "*the tax* imposed by this statute is an exaction by the sovereign *to be taken out of the net estate*" (page 372) it was the intent "to impose the tax *upon the entire net estate;*" the lien upon the gross estate "*was an administrative feature introduced for the purpose of making certain the payment.*" (page 371.)

Lien Upon Gross Estate and Payment by Executor do not Affect Incidence of Tax.

Opposing counsel assert that because there is a lien upon the gross estate for the payment of tax and because it is paid by the executor, it may be treated as a charge to be borne as a debt of the entire estate. It is interesting to note that this theory was urged and the same sections (sections 407-409, *federal estate tax*) cited to the court in *Re Newton's Estate, supra*, to support the view that "the burden must be borne by all the legatees;" and in answer to this the court correctly replied: "that was an administrative feature introduced for the purpose of making certain the payment."

See likewise *Scholey v. Rew*, 23 Wall., 331, 347, construing a succession tax law providing for a lien upon land, the court saying:

> "Nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land,

as the lien is merely an appropriate regulation to secure the collection of the exaction."

To the same effect is *State ex rel. v. Bonding Company*, 16 Ohio N. P. (n. s.), 497.

In discussing this question as presented by the federal estate tax law it is said in *Re Inman*, 101 Ore., 182, 192, 16 A. L. R., 675, 682:

> "Nor is such a tax necessarily made a direct tax on property merely because the statute provides for a lien upon property and requires payment by the executor or administrator, as *such provisions are nothing more than appropriate regulations to secure the collection of the tax.*"
>
> *Hampton v. Hampton*, 10 A. L. R., 514, 517, 188 Ky., 199, 202;
> *Matter of Gihon*, 169 N. Y., 443, 447.

Ohio Law Prescribing Payment of Debts of Decedent Inapplicable.

It has also been argued that the question must be determined by the law of Ohio, as Congress only requires payment by the executor and does not concern itself with the ultimate incidence of the tax. *This entirely overlooks the fact that in amending the original act, Congress expressly provided for deducting certain gifts from the gross estate in order to fix the net estate, the transfer of which is taxed.* In imposing the tax on the transfer of the net estate and in requiring the deduction of these residuary devises and bequests from the net estate, Congress gave certain legal effect to its language and impressed character upon the taxing law. *The effect of*

this amendment was to require the deduction of the tax from the net estate and to free the charitable institutions from contribution to its payment. This being the purpose of the act, no state can legally override such purpose by requiring payment from those whom Congress exempted from contribution to the tax.

It is also urged that the will provides: "all my just debts be paid" and this includes the tax. When the testatrix made her will there was no such tax. As we have pointed out it could not be her debt as it did not arise until her death, because a tax is not a debt (*Peter v. Parkinson*, 83 Ohio St., 36, 47; *State v. Harbeck*, 232 N. Y., 71), *nor is the federal estate tax a debt* (*Hampton v. Hampton*, 188 Ky., 199, 202, 10 A. L. R., 514, 518). In addition, it is not because the decedent leaves an estate that there is a tax *but because he transfers a net estate;* if there is no net estate there is no tax, therefore how can it be an *"estate"* debt? In *Plunket v. Old Colony Trust Co., supra*, relied upon by opposing counsel, it is said:

> "The will and codicils of the testator contain no direction respecting the payment of this tax. There is nothing written in any of these testamentary instruments which rightly can be construed as expressing the purpose of the testator on the subject. * * * It is not permissible for us to speculate as to existence of an intent * * * in the absence of any expression of testamentary purpose on the subject."

Some reliance has also been placed on *section* 10714 *General Code of Ohio*, providing for the order in which decedent's debts are to be paid, but as has been said, this was not a debt due from the decedent. All this is imma-

terial, however, because *this statute determines only the order of payment of debts and cannot possibly affect a federal statute creating a tax and providing for exemption from its incidence; it is the federal law that gives rise to the tax and by which its effect is to be determined. This statute requires the tax to come out of the net estate and no state law can change its incidence, or require it ultimately to be taken from what is no part of the net estate.*

The insistence that the tax is an administrative charge, is in conflict with the statute, which provides that the tax may not be deducted in arriving at the net estate. (Last line, *paragraph* 1, *section* 403.) Even before this language appeared in the act this was the rule:

> "The Federal estate tax is not determined, does not attach and cannot be assessed or paid until the net estate upon which it is based has been exactly determined. The estate tax, therefore, cannot be deducted from the gross estate to determine the taxable net estate."
>
> *Estate Tax Regulation* No. 37, Art. XXI (Corporation Trust Co. War Tax Service, 1919, p. 23).

If the total amount that would have gone to the residuary legatees, if the tax had not been taken from them, be deducted from the gross estate, and if the tax is taken from the residuary estate, it must follow that the tax is deducted because it is included within the aggregate deduction, which of course is plainly in violation of the statute.

Upon the whole it appears to us that Congress, in pro-

viding for the exclusion of the gifts to petitioners from the net estate, intended that these gifts should not be diminished by having the tax taken from them, and that no general rules of law authorizing the payment of debts from the residuary estate can be effective to detract from or modify the federal statute so clearly designed to free the residuary estate from this exaction, when that estate goes to those described in *paragraph* 3, *section* 403. The sole question here is the effect and meaning of a federal statute, thus presenting a federal question which cannot be eliminated or overridden by state statutes or state rules of law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 249.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, BEREA COLLEGE AND THE AMERICAN MISSIONARY ASSOCIATION,

Petitioners,

vs.

ORA DAVIS, ET AL.,

Respondents.

BRIEF OF RESPONDENTS.

The Federal Estate Tax Law Imposes Upon the Executor the Primary Duty of Paying the Tax. It Does not Provide Where the Ultimate Burden of the Tax Shall Rest as Between the Beneficiaries of the Estate. That Question is to be Determined by the Will and the Law of the State as Construed by the State Court.

The federal estate tax law (as amended 1918), taxing the transfer of a decedent's estate, imposes the tax upon

the executor, to be paid by him "out of the estate before its distribution." It is an estate tax as distinguished from the inheritance tax under the federal law of 1898 and under the inheritance tax laws of many of the states, which tax the receipt of the estate and impose the duty on the particular legacies or distributive shares and not on the whole estate transferred.

The executor of the will in question in this case, computed the tax and paid it as required by the law. There is no dispute in this case over the amount of the tax or over the duty of the executor to pay it. It was a charge against the estate which the executor was required to pay by the federal law, and also by the law of the state. (General Code of Ohio, §10714, **infra.**)

The executor brought this action in the Common Pleas Court of Franklin county, Ohio, under authority of the state statute (G. C. §10857) which follows the equity practice of permitting an executor to ask the direction and judgment of the court in any matter respecting the estate and property to be administered and the rights of the parties in interest. Among other inquiries, the executor asked whether he should charge the amount of this tax to the several beneficiaries of specific devises and legacies or deduct it, like other charges against the estate, in determining the "rest, residue and remainder" of the estate bequeathed to the residuary legatees. In other words, shall the executor charge the amount of this tax to the beneficiaries of the specific devises and legacies or charge it against the residuary legatees.

As "the right to regulate succession is vested in the

states and not in Congress" (**Knowlton v. Moore**, 178 U. S., 58; **Edwards v. Slocum**, 287 Fed., 651), the court must look to the will and the law of Ohio for the answer to this question.

The federal estate tax law stops at the provision that the executor shall pay the tax out of the estate before distribution. It does not undertake or pretend to say where the executor shall charge or collect the amount of the tax he has paid out of the estate. Congress has not assumed any jurisdiction further than to require the tax to be paid by the executor out of the estate. The tax being assessed by Congress against the executor upon the estate in his hands and made a lien on all the property of the estate except that part used for payment of charges against the estate (Sec. 409), it is for the state law and the will to determine against whom the amount of the tax shall be charged in adjudging how the estate shall be distributed among the devisees and legatees. The testatrix (the law of the state permitting) may direct where the amount of the tax shall be charged or in the absence of any such direction in the will, the state law controls the court in deciding whether this charge against the estate shall be charged against the residuary legatees or specific legatees. The will might provide, or, in absence of such provision in the will, the law of the state might provide that all such taxes shall be charged against the residuary legatees in determining "the rest, residue and remainder" of the estate, or might provide that the amount of all such taxes shall be charged to and collected from the specific devisees and legatees in

the proportions of the values of their several specific devises and legacies and not deducted, like other charges against the estate, in determining the rest, residue and remainder.

The will first provides that "all my just debts and funeral expenses shall be paid." We assume that "my just debts" includes all charges and taxes, although they may have accrued after the death of the testatrix and therefore were not strictly her debts. If that assumption is unwarranted, then the statute of Ohio (Gen. Code, §10714) applies and it provides:

> "Every executor or administrator shall proceed with diligence to pay the debts of the deceased, applying the assets in the following order:
>
> 1. The funeral expenses, those of the last sickness, and the expenses of administration;
>
> 2. The allowance made to the widow and the children for their support for twelve months;
>
> 3. Debts entitled to a preference under the laws of the United States;
>
> 4. Public rates and taxes, and sums due the state for duties on sales at auction;
>
> 5. To every person who performed manual labor in the service of the deceased, before payment of the general creditors, the full amount of wages due to such person for such labor performed within twelve months preceding the decedent's death, not exceeding one hundred and fifty dollars;
>
> 6. Debts due to all other persons."

The will then makes several devises and bequests of specific real estate and specific sums of money and specific personal property to certain of the testatrix's rela-

tives and friends, and in Item X bequeaths "All the rest, residue and remainder of my estate and property, real, personal and mixed," etc., to the petitioners. The Supreme Court of Ohio, in this case, has placed its construction on this will and on the law of Ohio regulating the distribution of decedents' estates, a jurisdiction exclusively in the state court. That court has declared that charges imposed by law must first be paid out of the estate as a whole before payment of charges imposed upon the estate by will; that under such a will a residuary legatee is in the position of a last lienholder after all prior, lawful claims and charges have been satisfied out of the estate and that "all the rest, residue and remainder of my estate," etc., "affords a clear and conclusive presumption that all charges imposed by the law or by the testator should be paid out of the estate before any right should ripen in behalf of the residuary devisees or legatees."

That is the judgment of the Ohio court construing this will and construing the law of Ohio. That is the direction of the court to the executor, based upon the court's construction of the will and the court's construction of the law of the state. The estate tax, being a charge against the executor and paid by him, the state court has determined that, under its construction of the will and of the law of the state, the executor should charge it against the residuary legatees in arriving at the "rest, residue and remainder" of the estate. The jurisdiction to construe the will and apply the law of the state is exclusively in the state court. The Supreme Court of the United

States would not reverse the judgment of the Supreme Court of the state on the grounds that the state court erred in construing the will or in construing the law of the state, as, for instance, if the United States court should be of opinion that the testatrix intended that charges and debts against the estate should be taken from the shares of specific legatees and not from residuary legatees, or that the law of the state requires all charges to be taken out of the shares of specific legatees.

Congress, having charged the tax against the executor, "to be paid out of the estate before its distribution" and made the tax a lien "upon the gross estate" except the part "used for the payment of charges against the estate and of its administration," properly left the ultimate burden of the tax to be determined by will, or, in absence of a will, by the state law, in recognition of the exclusive authority of the state to say where the burden of the tax shall rest. The provision that the tax shall be paid out of the estate before distribution is qualified by the words "unless otherwise directed by the will," thus recognizing the right of the testatrix, and therefore the authority of the state law which alone can control the right of the testatrix, to determine the legatees and devisees from whose shares the tax shall be taken. This involves no conflict of laws or jurisdictions, but is a recognition by the state of the right of Congress to tax and a recognition by Congress of the right of the state to control the distribution of estates.

As stated in **Plunkett v. Old Colony Trust Co.**, 124 N. E., 265 (Mass., 1919), cited and followed in **Taylor v.**

Jones, 136 N. E., 382 (Mass., 1922), where the federal estate tax was under consideration, "Since neither the act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate," and in **Re Newton's Estate**, 74 Pa. Sup. Ct. Rep., 361, "After the payment of the proper expenses against the estate, the tax imposed by this statute is an exaction of the sovereign to be taken out of the net estate, and the will, or in case of intestacy, **the law of the jurisdiction, comes into operation** upon what remains for distribution. The burden of such tax must therefore be borne by the residuary legatees."

As stated by Hough, C. J., in **Edwards v. Slocum**:

> "So far as the words of this statute are concerned the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."

It is significant that in none of the numerous cases in which residuary and specific legatees have disputed in the state courts over the question as to who should pay the federal estate tax no one has appealed to the Federal courts upon the pretext that a federal question is involved.

What is the "Rest, Residue and Remainder of the Estate?"

If this court is to render its judgment on what is the rest, residue and remainder of the estate within the meaning of the will and laws of Ohio, regardless of the judgment of the Ohio court, then we maintain here, as we did in the state court, that a residuary legatee does not stand on an equal footing with specific legatees and devisees.

The benefaction conferred by a residuary bequest is only that which remains after charges, cost of administration and the specific legacies and devises have been paid in full. The residuary legatee is the "person whose interest in the estate of the decedent * * * is subject to * * * prior liability for the payment of taxes, debts or other charges against the estate" within the meaning of Section 408 of the estate tax law. The residuary legatee, therefore, is the person from whose interest the tax must be paid or against whose interest the executor must charge the tax paid by him.

It is the general rule of law that, failing a testamentary provision to the contrary, debts, charges and all just obligations upon the estate must result in the reduction of the residue of the estate. The general laws of administration in all jurisdictions provide for the order in which property shall be resorted to for the payment of debts and charges against an estate. In Ohio, **Section 10714, General Code, supra**, directs the order in which charges and debts against the estate shall be paid. The

residuary legatees can take only the residue of the estate after the costs, charges, debts and specific legacies are paid. That residue necessarily must be precisely the same whether the legatee who receives it is a charitable institution or the recipient of property on which the tax has been paid within the last five years, or of property represented by the $50,000.00 deduction, or any other legatee.

The authorities hold that the federal estate tax is a charge against the estate, that the residue of the estate is found after deducting this and all other charges against the estate and that therefore the ultimate burden of the tax must rest upon the residuary legatees.

The act of 1917 provided that the amount of charges against the estate and $50,000.00 should be deducted, in finding the value of the net estate for the purpose of the tax. The 1918 amendment authorized the additional deductions of an amount equal to the value of any property of the decedent on which this tax had been paid within the last five years, and the amount of certain bequests, among which were those to educational and charitable institutions. Petitioners are such institutions and counsel for petitioners contend that as the authorities had under consideration the act prior to the 1918 amendment, they have no application to this case. We maintain that the question in this case, under the amended act of 1918, is the same as under the act prior to the amendment. In the cases which we shall cite there was no dispute as to whose interest should be burdened with the tax on the value of the residuary estate. The residuary legatees

conceded that the tax on the value of the residuary estate should come out of the residuary estate, but they contended that they should not be burdened with the tax on the value of that part of the estate transferred to the specific legatees—precisely the same contention made by the petitioners in this case. There is no dispute here as to whose interests shall be burdened with the tax on the value of the property going to the residuary legatees. There is no such burden for there is no tax computed on that value. The petitioners contend that as they do not receive the part of the estate making up the value upon which the law computes the tax, it is unjust that they should be compelled to pay the tax. They urge here, just as the residuary legatees urged in the cases under the 1917 act, that those who receive the specific legacies should pay the tax computed on the value of those legacies and that this is the implied intention of Congress.

The principle in this case is the same as in the cases under the 1917 act, that the tax is charged against the executor and the estate in his hands and paid by him and therefore comes off of the residuary estate. The rest, residue and remainder of the estate must be the same irrespective of the character of the residuary legatees. What is left after paying charges against the estate and specific legacies, is the rest of the estate, whether it goes to a charitable institution under the act of 1918 or the act of 1917, or whether it goes to a charitable institution or an individual under the act of 1918.

The Following Authorities Hold that the Burden of the Federal Estate Tax Rests Upon the Residue:

The clear distinction between an estate tax and a legacy tax is demonstrated in the history of such taxation outlined by Mr. Justice White in **Knowlton v. Moore**, 178 U. S., 41. Quoting from Hanson's Death Duties, he says:

> " 'Historically, probate duty is the oldest form of death duty, having been established in 1694.' The probate duty thus referred to was 'a fixed tax dependent upon the sum of the personal estate within the jurisdiction of the probate court, payable on the grant of letters of probate, by means of stamp duties **and was treated as an expense of administration to be deducted out of the residue of the estate.**' " (p. 48.)

Art. I of Regulation No. 37 (Revised) of the Internal Revenue Department is as follows:

> "The Federal Estate tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property, but upon its transfer from the decedent to others. The subject of the tax is the transfer of the entire net estate, not any particular legacy, devise or distribution thereof. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent, have no bearing upon the question of liability or the extent thereof. The transfer of the property is taxable, although it escheats to the state for lack of heirs."

In **United States v. Woodward**, 256 U. S., 632, Mr. Justice Vandevanter, referring to the federal estate tax, said (p. 635):

> "It is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. * * * It does not segregate any part of the estate from the rest and keep it from passing to the administrator or executor for the purposes of administration, as counsel contend, but is made a general charge on the gross estate and is to be paid in money out of any available funds, or if there be none, by converting other property into money for the purpose."

In **Thurber's Federal Estate Tax (Sec. 223)** it is said:

> "Two purposes appear: (a) the general purpose that the tax shall be paid before the distribution of the estate **(in which case, if there is a will, the burden falls upon the residuary legatee)**; and (b) that if not so paid no particular beneficiary or class of beneficiaries shall pay more than his or their proportion of the tax."

In **Taylor v. Jones, 136 N. E. 382** (Mass. 1922) it is said:

> "The tax imposed by act Cong. Sept. 8, 1916, c. 463, par. 201, as amended (U. S. Comp. St., par. 6336½b) is an estate tax and not a legacy or succession tax, and must be paid out of the residue of the estate when no provision is made by the will for its payment."

In **Hamlin v. Wellington**, 124 N. E., 4; 226 N. Y., 407; (1919), the testatrix made specific bequests, and then gave the residue of the estate to certain residuary legatees. The executor deducted a proportionate amount of the federal estate tax from each legacy. The specific

legatees objected to this deduction, maintaining that the entire tax should come out of the residuary estate. The court held that the federal act created an "estate tax" as distinguished from an "inheritance tax" and that the entire tax was payable from the estate and no part chargeable to the specific legatees. The court say:

> "Had the congress desired to provide for an apportionment of a tax amongst the legatees, it might readily have used language adopted by that body in 1901 (U. S. Statutes at Large, Vol. 31, c. 806, Sec. 11) when it amended Section 30 of the act of 1898 reviewed in the **Knowlton Case, Infra,** by adding thereto 'Any tax paid under the provisions of Sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged' or as provided in our statute that the executor shall deduct the tax on a legacy or distributive share." (p. 7.)

In **Plunkett v. Old Colony Trust Co.,** 124 N. E. 265 (Mass. 1919), followed in **Taylor v. Jones, supra, Rugg, C. J.,** stated the question as follows (p. 265):

> "This petition by the executors is brought to determine whether the federal tax which has been paid should be charged entirely against the residuary estate or apportioned pro rata among all the devisees and legatees."

After distinguishing this as an estate tax and not as a legacy or succession tax, and stating that the will contained no direction respecting the payment of the tax, he said (p. 267):

> "So far as any inference may be drawn, it would seem to be that taxes were intended to fall where the law placed them. It is not permissible for us

to speculate as to the existence of an intent to make a different provision from that provided by law in the absence of any expression of testamentary purpose on the subject. It is the general rule that, failing any testamentary provision to the contrary, debts, charges and all just obligations upon an estate must be paid out of the residue of an estate. The benefaction conferred by the residuary clause of a will is only that which remains after all paramount claims upon the estate of the testator are satisfied. **Tomlinson v. Burry,** 145 Mass., 346, 11 N. E., 137; 1 Am. St. Rep., 464. The tax is a pecuniary burden or imposition laid upon the estate. **Boston v. Turner,** 201 Mass., 190, 87 N. E., 634. In its nature it is superior to the claims of the residuary legatee. Since neither the act of congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate. **Matter of Hamlin,** 226 N. Y., 407."

In **re Roebling's Estate,** 104 Atl., 295, (N. J., 1918), the question was whether the federal estate tax should be deducted in computing the state inheritance tax. The court say (p. 296):

"The concluding words of Section 208 (U. S. Comp. St., 1916, Sec. 6336½i), 'It being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution,' are unmistakable in their purport that the death duty is imposed upon the estate and payable out of the residue. To be more precise, it is imposed upon the estate transferred by death, not upon the succession resulting from death. The distinction is well defined and recognized in countries where both kinds of tax exist. The federal tax resembles the probate duty of act July 1, 1862, c. 119, 12 U. S. Stat., p. 483, which was payable by the executor out of the estate, while the legacy duty therein provided

for (p. 485) was payable by the beneficiaries. The tax occupies the same field of death duty as does the 'estate tax' in England."

In **People v. Passfield**, 120 N. E., 286 (284 Ill., 450, 1918), the same question was considered, that is, whether the federal tax is deductible in computing the tax under the state inheritance tax law. The court said, **page 288**:

"As the duty is made payable by the executor or administrator to the collector or deputy collector by the express provisions of the statute, the duty is an expense or a charge against the estate of the decedent, and not an express charge against the shares of the legatees or distributees of the decedent. The legatees and distributees cannot in any sense be held to have 'received' any part of the duty that is paid to the government by the executor or trustee or administrator as such estate tax, and there is no language in the act that will permit a construction that the duty is levied upon each share of the legatees or distributees of the decedent, as was given the federal act of 1898 by the court in **Knowlton v. Moore, supra.**"

In **re Newton's Estate**, 74 Pa. Sup. Ct. Rep., 361, the court said (Syl.):

"After the payment of the proper expenses against the estate, the tax imposed by this statute is an exaction by the sovereign to be taken out of the net estate, and the will, or in case of intestacy, the law of the jurisdiction, comes into operation upon what remains for distribution. The burden of such tax must therefore be borne by the residuary legatees."

After an illuminating detailed review of the federal statute, in the opinion, it is stated:

> "It is a tax upon the interest which ceased by reason of the death of the person whose property it was. The will of Lillie G. Newton contained no direction that the burden of the tax should be borne by any particular legatee or class of legatees. It follows, therefore, that the tax must be paid out of the general funds of the estate. It is the general rule that failing in testamentary provision to the contrary, debts, charges and all just obligations upon an estate must result in a reduction of the interest of the residue of that estate. The benefaction conferred by the residuary clause of a will is only of that which remains after the specific and general pecuniary legacies have been satisfied. The burden of the tax must in this case be borne by the residuary legatees." (p. 372.)

Bullard v. Redwood Library, 91 Atl., 30 (R. I. 1914), while not involving a federal tax, is instructive on the contention of counsel for petitioners that only that part of the estate which gives rise to the tax should bear the burden of the tax. In that case the testatrix was a resident of Rhode Island, but some of the personal property bequeathed was in Massachusetts, and therefore subject to the inheritance tax laws of Massachusetts. The executors paid the tax, and it was contended that the legatees who received the personal property so made the subject of the tax in Massachusetts should be charged with the tax, seeing that it was their property, and not the property of other legatees which made it necessary for the executor to pay this tax.

The court held:

"1. In the construction of a will, giving legacies of personal property situated in and subject to the inheritance tax laws of another state, the question whether such tax shall be charged against the legacies given or not is one of the testator's intent, in view of all the circumstances.

"2. Personal property has no locality, but is sold, transmitted, bequeathed by will, and descendable by inheritance according to the law of the owner's domicile, and not according to the law of the situs.

"3. A testator, domiciled in the state of Rhode Island, is presumed to have made his will in accordance with the existing laws of such state.

"4. Testatrix died domiciled in this state, and her will was probated and her executors appointed by a probate court of this state. She left personal property in Massachusetts, to get possession of which her executors were obliged to take out ancillary letters testamentary in Massachusetts, and to pay inheritance taxes assessed against certain legacies. **Held,** that as the taxes were merely a charge on the particular property because of the jurisdiction of Massachusetts over it by reason of its situs therein, and not on the legacies given by the will, and as such foreign tax law could not regulate the exercise of testamentary power by a domiciled resident of this state, the amount of the tax was not a charge against the pecuniary legacies, but a part of the expenses of administration chargeable against the general estate.

"6. A gift of a 'residue' is subject to the precedent claims upon the estate, it is a gift of what remains after the debts and legacies are paid."

In **Hazard vs. Bliss**, 113 Atl., 469 (R. I., 1921), the case of **Bullard vs. Redwood Library, supra**, was reviewed, and it was held:

> "4. For the purpose of assessing state inheritance taxes, under inheritance tax act of 1916, that portion of the assets of the estate which the executor used to pay federal estate tax, under a federal estate tax law (U. S. Comp. St., Sec. 6336½a-6336½m) is a part of the estate transferred from the testator, and must be considered as having been transferred to the residuary legatee.
>
> "5. In the absence of a testamentary provision to the contrary, all charges against an estate of a decedent fall upon the residue and reduce the amount of the residuary legacy, and if the estate is sufficient to pay the other legacies and the charges against the estate, the question of the reduction of such legacies by the payment of a federal tax does not arise."

In **Dexter v. Jackson**, 140 N. E., 267 (Mass., May 1923), it was held:

> "Under Revenue Act U. S. 1918, Secs. 401, 407, 408, the estate itself must bear the burden of the estate tax, and it must be paid out of the residue, unless testamentary intention to the contrary is expressed."

De Courcy, J., said:

> "The federal estate tax is a tax on the net estate transferred by death and not on the particular devises, legacies or distributive shares * * * it is the estate itself which must bear the burden of the tax. * * * We find no intention expressed by the testatrix that the residue should be exonerated from the payment of the tax. * * * The general rule is that all expenses of administration are to be paid from the residue."

In **Edwards v. Slocum**, Hough, C. J., after stating that it was for the state courts to settle where the burden of the federal estate tax shall rest, and stating that it had been settled, so far as the Sage estate was concerned, by the Hamlin case (226 N. Y., 407), said:

> "And this tax is payable out of the whole estate as a paramount charge, which in effect casts it on, or takes it out of the residuary. **That the residuary estate is devoted to charity, etc., makes no difference.**"

In **Bemis vs. Converse**, 140 N. E., 686, 687, (Mass., July 1923), Rugg, C. J., said:

> "Courts cannot speculate concerning the intention of settlors and testators as to where they intend the burden of taxes to rest. The instrument as written must govern. Opportunity is freely open in framing trust deeds and wills to make full and accurate expression of desire and intention respecting the payment of taxes and the particular beneficiaries whose shares shall be exonerated from or bear that pecuniary exaction for the support of government. Specific provision on this point is familiar in wills and is not infrequently found in other instruments. In the absence of a definite declaration on the subject it must be presumed that the intention was that the ultimate weight of taxation must rest where the law places it. It cannot be presumed that anything else was intended than what is stated in the written instrument. It may be, for aught that now can be known, that the precise result which has happened was intended. There is no jurisdiction in equity to prescribe what may seem fairer than the settlor or testator has declared. To do that is as foreign to chancery principles as to remold a will in order to make it conform to different conceptions of justice or fairness from those indulged by the testator."

The "Net Estate" Comprises all the Property that is to be Transferred to all the Beneficiaries. The Law Makes Deductions in Determining the Value of the Transferred Estate for the Purpose of the Tax but not to Reduce the Amount of the Transferred Net Estate.

Counsel for petitioners claim that this case should not be governed by the universal rule that all debts and charges are payable out of the residuary estate. They claim that the 1918 amendment of the estate tax law has modified this rule. They predicate their argument on the assertion that "net estate" in the act means that portion of the estate and property after setting aside (1) that portion used to pay charges against the estate, (2) the property on which the tax has been paid within five years, (3) the property comprising the bequests to charitable institutions, and (4) $50,000.00 worth of property. Therefore they maintain that the residue of this estate bequeathed to the petitioners is not part of the "net estate."

The phrase "net estate" always has had a clear, unmistakable meaning in the law of administration of estates. It means the entire estate less the part used for the payment of debts and charges. The federal act does not change this meaning. It does not give the words "net estate" any new meaning.

As said by Hough, C. J., in **Edwards v. Slocum, supra:**

> "The phrase 'net estate' is not new but very old. It conveys the plain meaning of what is left for in-

> stant use; it is the clear or clean estate, a synonym usually suggestive of the original French word * * * for practical purposes it is the taxable estate."

Congress might have imposed a legacy tax on each legacy exceeding a certain amount. It might have exempted some legacies. It might have exempted legacies to certain relatives or charities and taxed all others. It did not adopt either of these methods. It did not tax certain legacies and exempt others. It predicated the tax on the value of the estate computed as prescribed by the law. To carry out the intent of not taxing small estates, the tax is imposed only on estates having a value for taxation purposes exceeding a certain amount. Congress might have fixed a percentage of the actual value as the value for the purpose of the tax, as, for instance, 60%, and this would have been the value for tax purposes of the entire estate and property transferred. It might have provided that in computing the value of the net estate one-half the amount bequeathed to charity should be deducted. Congress provided that the property should be appraised at its real value and that from this actual value there should be deducted the arbitrary amount of $50,000.00 and certain other amounts, and the remainder thus obtained should be "for the purposes of the tax the value of the net estate." (Sec. 403.) This served to reduce the taxable value of the net estate but did not reduce the net estate or exempt any of the net estate. A person making a will is advised by the act that, to the extent of the value of the property he may give to charity, no tax will be charged against his estate.

We quote the following from page 12 of brief of counsel for petitioners:

> "The clearest and most graphic description of this tax is that given by the Supreme Court of Oregon in **Re Estate of Inman**, 101 Ore., 182, 16 A. L. R., 675, 199 Pac., 615, wherein it is said:
>
> 'Every estate within the embrace of the federal statute must pass through the federal government's toll gate before it can be divided, and the several portions into which it is divided sent onward to their respective destinations. Figuratively speaking, this toll gate is erected and maintained **at the place where the net estate of the decedent is assembled** preparatory to its division and distribution; but, **before the net estate** can be divided and pass through the toll gate, a toll must be paid to the national government. **This toll is fixed and collected upon the assembled net estate considered as a unit**, without regard to the different portions into which it is to be divided, and without regard to the different roads over which the several portions are to go after passing through the toll gate, and without regard to the destination of the different portions.'"

We agree that this is a most graphic description of the tax. It is a most graphic description of the "net estate." It describes it as all the estate in the hands of the executor after the payment of costs and debts. None of the estate then in the hands of the executor escapes passage through the government toll gate. There the executor must assemble all the estate left after paying the costs and debts. Then the revenue commissioner values this entire net estate according to the method and with the deductions prescribed by the statute. None of the estate can be transferred by the executor to any

beneficiary, whether a charitable institution or other beneficiary, until the tax is paid. It is "fixed and collected upon the assembled net estate considered as a unit." When the executor pays the tax upon the entire net estate as valued by the revenue commissioner, all may pass through, the executor may transfer all the legacies and devises. The specific legacies will pass through and be transferred without any deductions. Beneficiaries of specific devises and legacies will receive them in full. The residuary legatees will receive only what the executor has left after he has transferred the specific devises and legacies, and after he has paid the tax. The net estate comprises every devise and legacy.

In the consideration of this act, it must be observed that **value** is carefully and consistently fixed as the basis for applying the percentages in computing the tax. This value is to be found in the method prescribed by the act. The deductions are from the **value** of the gross estate and when the deductions are made, the **value, for the purpose of the tax,** is found.

Section 401 provides "A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate," following with the progressive percentages.

Section 402 provides, "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property," and then follow provisions for including the property transferred in contemplation of death, etc.

Section 403 provides "That for the purpose of the tax, the value of the net estate shall be determined (a) in the case of a resident, by deducting from the value of the gross estate (1) such **amounts** for funeral expenses, administration expenses, claims against the estate," etc., "(2) an **amount** equal to the value at the time of the decedent's death of any property" of the decedent upon which the tax has been paid within five years. "(3) the **amount** of all bequests, legacies, devises, or gifts to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," etc., "(4) an exemption of $50,000."

This value after making the deductions from the value of the gross estate is the value of the estate transferred, upon which the tax is computed as provided in Section 401. The amount of property transferred is not reduced. All property passing to all the beneficiaries is still the estate transferred. The act provides for computing the percentages on a value of that property, for the purpose of the tax, less than its actual value, by making the deductions from the value of the gross estate, and this is the tax the executor is required to pay out of the estate.

Section 404 directs the executor to make a return "setting forth, (a) the value of the gross estate of the decedent at the time of his death, or in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under Section

403; (c) the value of the net estate of the decedent as defined in Section 403; (d) the tax paid or payable thereon."

Section 407 provides that the executor shall pay the tax.

Section 408 provides that if the tax is not paid within 180 days, the collector shall commence proceedings "to subject the property of the decedent to be sold" and no provision is made for the exemption from such sale of any property to be transferred.

This section further provides:

> "If the tax, or any part thereof, is paid by or collected out of that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed, or by just and equitable contribution by the persons whose interests in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate, or whose interest is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution."

The prior liability of residuary legatees is an instance of the prior liability recognized in this section.

The provision that the tax shall be paid out of the estate before its distribution leaves no doubt that this is an estate tax, not a legacy tax, charged against the estate in the hands of the executor and not against the

beneficiaries, and the burden, like that of all other charges against the estate, must rest on the residuary legatees.

Section 409 provides:

> "That unless the tax is sooner paid in full, it shall be a lien for ten years **upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration,** allowed by any court having jurisdiction thereof, shall be divested of such lien."

The property used for the payment of charges against the estate is the only part of the gross estate divested of the lien. No legacy or devise is thus exempted or divested of the lien. The lien is upon all the remainder of the estate, which includes all property transferred or passing to beneficiaries. It includes property bequeathed to charitable institutions, the property upon which the tax has been paid within the last five years, and the $50,000.00 worth of property deducted in determining the tax value.

The act would not have created a lien for the payment of the tax on any property intended to be exempted from the payment of the tax or from any part of the tax. Imposing a lien upon property for the payment of the tax by one provision and exempting the same property from liability for the tax by another provision is an inconsistency too absurd to be implied and only tolerated if clearly expressed. That the act divested the property needed for the charges and expenses from the lien and did not divest the property upon which the tax was paid

within five years, the property given to charity, and other property to the value of $50,000.00, discloses the intent not to divest such property of the lien and not to free it from liability for payment of the tax. If it had been the purpose of Congress to "exempt" charitable institutions or to "exempt" the property bequeathed to them, they would have been added to the exception of the part of the estate used for expenses and charges in Section 409.

Counsel for petitioners refer to "non-exempt classes," implying that these residuary legatees are exempt classes (p. 22), and then say that if a part of the residuary bequests are to non-exempt classes, both exempt and non-exempt classes must bear their proportionate shares of the tax and that therefore there is "a reduction of tax that would inure for the benefit of those for whom Congress had provided no exemption." The tax paid by the executor was $31,000.00. Suppose the estate left, after paying charges and the specific legacies, were $62,000.00 and the will had bequeathed the residue of the estate to a charitable institution and to an individual share and share alike. According to the contention of counsel for the petitioners, half of the $62,000.00 would be taken from the individual beneficiary to pay the $31,000.00 tax and so the individual would get nothing and the other $31,000.00 would go to the charitable institution, while the will says that each residuary legatee shall have one-half the residue.

Counsel for petitioners contend that Congress intended to exempt the property given to charitable institutions

from contributing to the payment of any portion of the tax. If it were intended that the property given to charitable institutions under Subdivision 3 of Section 403 should be exempt, it must follow that the beneficiary of property mentioned in Subdivision 2 of Section 403 would likewise be exempt from the tax.

Assume that A died possessed of a million dollars worth of property which consisted, in part, of a country home valued at $200,000.00, and which he received from his father's estate within five years prior to his death and on which the estate tax was paid. Assume further that A devised this $200,000.00 estate to his son B and that the rest of the property was specifically devised to other children. We maintain that in arriving at the value of the net estate, $200,000.00 would be deducted under Subdivision 2 of Section 403, and the federal estate tax would then ultimately be borne pro rata by all the devisees and legatees.

Under opposing counsel's contention, the son who received the $200,000.00 estate could not be called upon to have his property contribute in any wise to the tax. We think it plain this contention is erroneous. If this contention is erroneous in regard to property under Subdivision 2 of Section 403, then opposing counsel's contention is likewise erroneous under Subdivision 3 of Section 403.

Counsel for petitioners say that the amendment of 1918 was to relieve petitioners from this tax and that it was to inure to the benefit of those whose bequests were to be deducted, but contend that upon the theory of the Su-

preme Court of Ohio this deduction can benefit none and that it becomes meaningless except to reduce governmental revenue which was not its design. These residuary legatees are benefited to the extent of the reduction of the tax under the 1918 amendment. Under the former law, the percentages would have been applied to the value of the entire estate after deducting charges against the estate and $50,000.00, whereas the amendment applies the percentages to the value found after making the further deductions under the 1918 amendment.

If the entire estate had been bequeathed to these charitable institutions, they would have benefited to a much greater extent, but when it is known that the residue of this estate is approximately $300,000.00, it is easily seen how these beneficiaries derive a very substantial benefit under the amendment of 1918.

In conclusion we submit: (1) that the federal law makes no assessment of the tax as between the beneficiaries under the will, and the question as between them is to be determined by the will and the state law as construed by the state court; (2) the residue of the estate is to be found in the same manner as under the act before the amendment of 1918, after deducting all charges including the charge of this tax and deducting the specific legacies and devises, and (3) the net estate is the entire estate and property assembled for transfer to all the beneficiaries and not merely the estate and property passing to those whose shares are not included in paragraphs (2), (3), (4) of Section 403.

Respectfully submitted,

ARTHUR I. VORYS,
JAMES M. BUTLER,
Attorney for Respondents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, BEREA COLLEGE, and THE AMERICAN MISSIONARY ASSOCIATION,
Petitioners,
vs.
ORA DAVIS, ET AL,
Respondents.
No. 915

PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully ask a rehearing of their petition for a writ of certiorari to the Supreme Court of Ohio, denied on the 23rd day of April, 1923, for the following reasons:

1. On May 7, 1923, this Honorable Court granted the petition for writ of certiorari to the

United States Circuit Court of Appeals for the Second Circuit in the case of William H. Edwards, formerly Collector of Internal Revenue for the Second District of New York, Petitioner, vs. Joseph Jermain Slocum, et al, as Executors of the last will and testament of Margaret Olivia Sage, deceased, Respondents, No. 974, October Term, 1922.

The fundamental question in that case is the same as in this, namely, the proper method of ascertaining and assessing the etsate tax under the Revenue Act of 1918 (Act, Feb. 24, 1919, 40 Stat. 1096; c. 18, Section 400, et seq.) in cases where there are residuary bequests to religious, charitable, scientific, literary or educational corporations. The same question arises also where such bequests are made for public purposes. (Sec. 403 (a) (3).)

It is stated in the brief of the Solicitor General in support of the petition in case No. 974, page 7,

> "* * * the particular question in the case at bar is to determine the 'amount of' the residuary gifts to charity."

That is also the question in the Ohio case, and is and will be the question in all cases where under a will there is a residuary devise to exempt institutions.

This question requires the construction of the Revenue Act of 1918 in two vital matters:

(a) How, in such cases, is the *net* estate to be determined;

(b) Does Sec. 403 (3) of that Act exempt a charitable bequest from the estate tax by excluding it in calculating the *net* estate upon the transfer of which the tax is levied; if so, does the fact that such a bequest happens to constitute a part or all of the residuary estate divest it of the privilege granted by the statute?

2. In case No. 974 the immediate question is whether, in determining the net estate, the exempted residuary estate is to be deducted before the calculation of the tax, or whether the net estate is to be determined by deducting the residuary estate as reduced by the tax. This question is in fact incidental to the real question above stated; namely, whether or not, in view of the exemption provided by Sec. 403 (3) a charitable bequest is subject to the estate tax at all. If the Government is not correct in its contention in case No. 974 that the tax comes out before the residuary estate is determined, it is because the residuary estate is *exempt* from the tax, and if it is exempt the State courts can not shift to it the burden from which it is released by Congress.

3. The question, as stated by the Solicitor General, is of the utmost importance and of great general interest, as its solution will establish the rule applicable to the settlement of all estates where

there are bequests to exempt institutions, or for public purposes.

If Sec. 403 (3) grants an exemption from this tax to charitable institutions, then such exemption must be respected by the State courts although the distribution of estates is a State matter. The tax is not a state tax, and the State has no power either to shift or lessen its burden, no power with reference to it at all. To deny the exemption, if it in fact exists, is to deny a privilege and immunity conferred by a federal statute. *American Express Company vs. Maynard,* 177 U. S. 404.

Respectfully submitted,

JAMES I. BOULGER,
GUY W. MALLON,
HENRY A. WILLIAMS,
FRANK DAVIS, JR.,
Attorneys for Petitioners.

CERTIFICATE

I hereby certify that I have carefully read the foregoing petition for rehearing; that I believe it to be meritorious, and that I know it is not filed for the purpose of delay.

FRANK DAVIS, JR.

May 14, 1923,

Washington, D. C.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, ET AL. *v.* DAVIS ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 249. Argued January 11, 1924.—Decided February 18, 1924.

1. The Estate Tax imposed by the Revenue Act of 1918, c. 18, 40 Stat. 1096, is not a succession tax upon the benefits received by devisees and legatees, but an excise or death duty upon the transfer of the decedent's estate. P. 49.
2. In providing that bequests to religious and charitable corporations shall be deducted in determining the value of the net estate upon which the tax is imposed, § 403, (3), the act does not undertake to exempt the recipients of such charitable gifts from the burden of the tax if placed upon them by the will. P. 50.
3. Hence, where the charitable gifts are residuary, and are duly taken into account in ascertaining the net taxable estate and the amount of the tax, the act offers no obstacle to charging the tax, with other costs and expenses, against the gross estate and satisfying specific devises and bequests in full, before the charitable gifts are satisfied. *Id.*

106 Oh. St. 366, affirmed.

CERTIORARI to a judgment of the Supreme Court of Ohio which affirmed a judgment directing an executor to deduct a federal estate tax from the residuary estate, given by the will to the present petitioners, and not from the specific devises and bequests to the respondents.

Mr. James I. Boulger, with whom *Mr. Frank Davis, Jr., Mr. Henry A. Williams* and *Mr. Guy W. Mallon* were on the brief, for petitioners.

Mr. Arthur I. Vorys, with whom *Mr. James M. Butler* was on the brief, for respondents.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Mary J. Sessions, a citizen and resident of Columbus, Ohio, died on April 1, 1919, leaving a will executed Sep-

tember 17, 1914, and disposing of a considerable estate. The executor paid a tax of $31,000 to the United States as the so-called "Estate Tax" under the Revenue Act of 1918, enacted February 24, 1919, c. 18, 40 Stat. 1057, 1096.

The question in the case is what effect this payment shall have in the distribution of the estate among the legatees and beneficiaries under the will. After providing that her just debts and funeral expenses be paid and making a number of specific legacies and devises, the testatrix gave the rest, residue and remainder of all her property of every description, including lapsed legacies, to the Young Men's Christian Association of Columbus, the Young Women's Christian Association of Columbus, Ohio, Berea College and the American Missionary Association, to be divided equally among them.

Section 401 of the estate tax law *ubi supra*, imposes "a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403)" "upon the transfer of the net estate of every decedent dying after the passage of this Act." Then follow the percentages graduated according to value.

Section 403 provides that for the purpose of the tax the value of the net estate shall be determined in the case of a resident of the United States by deducting (1) funeral and administration expenses, claims against the estate, losses from casualties not insured against and amounts which by law of the domicile are required for support of dependents of testator, but not including income taxes or estate, succession, legacy or inheritance taxes, but (2) including property received by decedent by will or descent within five years on which an estate tax was paid, and (3) deducting:

"The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for

the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . ."
and (4) "an exemption of $50,000."

It is admitted that the corporations mentioned in the residuary clause of the will come within the description of subdivision (3).

The executor deducted from the gross estate the debts, losses and charges and the specific devises and bequests, to find the value of the residuary estate, which, together with the debts, losses and charges, and $50,000, he then deducted from the gross estate to get the value of the net estate by a proper percentage of which the tax was measured and fixed. After paying the tax, he brought an action in the Common Pleas Court of Franklin County, Ohio, asking the direction of the court as to whether the tax should be deducted from the amounts which were about to be distributed to the specific legatees and devisees, or from the residuary estate given to the charitable and educational institutions named. All those taking under the will were made defendants. The Common Pleas Court and the Court of Appeals of Franklin County and the State Supreme Court all held that the tax must be paid out of the residuary estate, and a judgment was entered accordingly. We have brought the case here by certiorari because of the federal question, seasonably made in all the courts by the residuary legatees, that, in the payment of the federal estate tax out of their residuum, they are deprived of a federal right of exemption from the tax intended to be secured to them by subdivision (3) of § 403.

The argument of the petitioners is, that as the tax is expressly made equal to a percentage of the value of the net estate and is imposed upon the transfer of that net estate, Congress can not have intended that the tax

should be paid out of the very gifts which by subdivision (3) are excluded from the net estate. It is further urged that the manifest purpose of Congress was to exempt the beneficiaries under subdivision (3) from tax, and the result of the construction by the Ohio courts is in this case that they are the only ones to pay it. These arguments are persuasive, but they derive much of their strength from the special circumstances of the present case. They are pressed from a different standpoint from that of Congress. What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49.

Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific exemption of those gifts but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him "if you will make such gifts, we'll reduce your death duties and measure them not by your whole estate but by that amount, less what you give." In § 408 it is declared to be the intent and purpose of Congress that as far as it is practicable and unless otherwise directed by the testator, the tax is to be paid out of the estate before distribution.

There is nothing in subdivision (3) of § 403 which exempts the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the amount of the estate which is to measure the tax. It exempts the estate from a tax on what is thus deducted just

as subdivision (4) exempts in terms the estate from taxation on its first $50,000; but this does not operate to exempt any legatee who may be entitled to the first $50,000 in the distribution, from deduction to contribute to the tax ultimately imposed, if by the law of the State, such should be its incidence.

It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor, if she chose. It must be presumed when she failed to exercise the power, that she intended the incidence of the tax to be where otherwise by law it must be and therefore, that it was her purpose that her residuary legatees were to receive all that was left after paying all charges, including this tax, out of her estate. The donees of the altruistic gifts profit much by the deduction made under subdivision (3) even though they do receive less by the amount of this tax. Had subdivision (3) not been in the statute, the tax would have been much heavier, measured by a higher percentage of the value of the whole estate including their gifts. It is hardly true to say that under the judgment of Ohio courts these residuary gifts are taxed. The gifts are and were intended by the testator to be indefinite in amount and to be what was left after paying funeral expenses, attorneys fees, executor's compensation, debts of the decedent and taxes. These donees do not pay the taxes any more than they pay the funeral expenses, the lawyers, the executors and the testator's debts.

Judgment affirmed.